

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1800.

No. 439.

THE ADIRONDACK RAILWAY COMPANY, PLAINTIFF
IN ERROR,

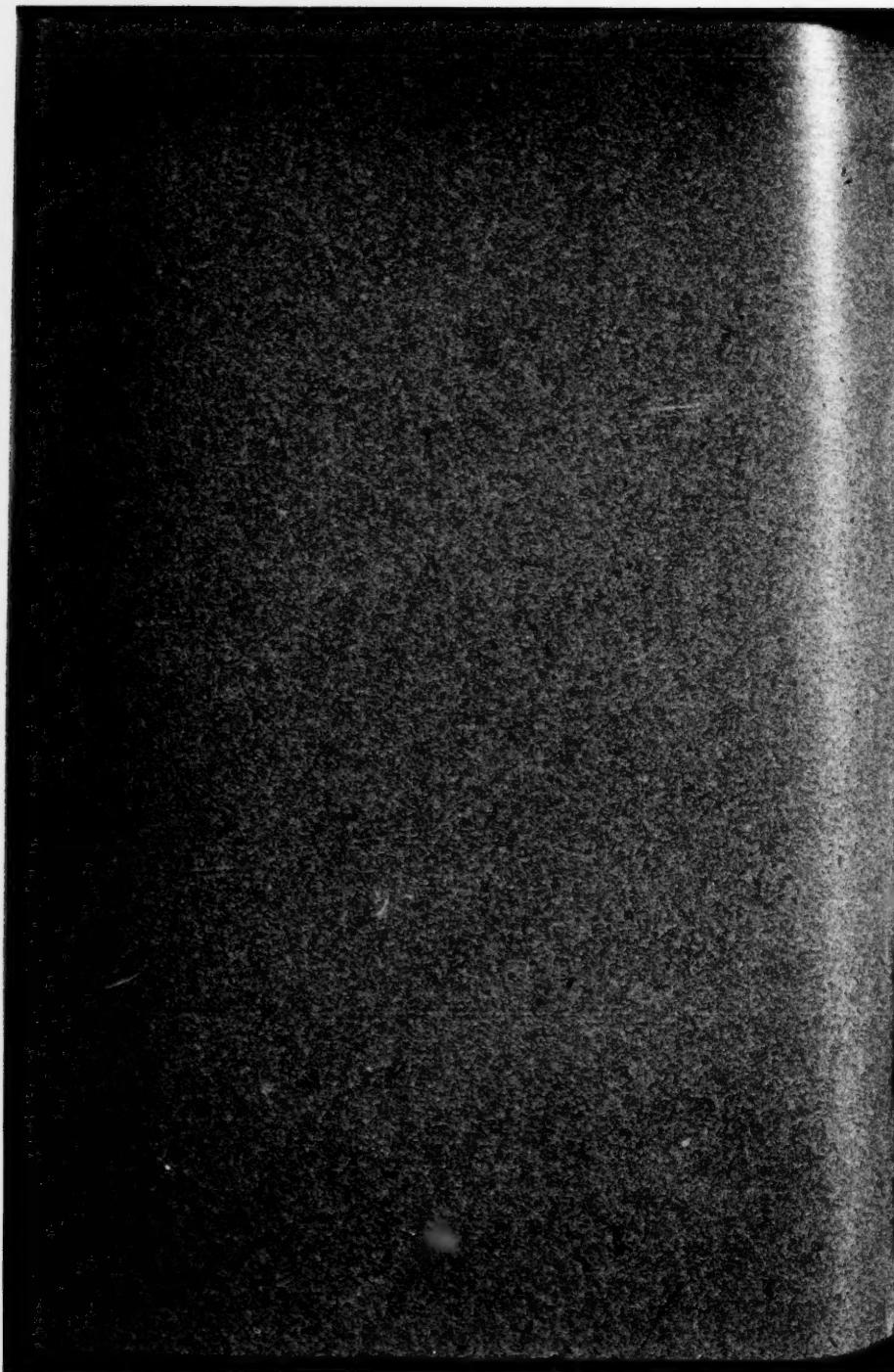
vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW
YORK

FILED NOVEMBER 5, 1800.

(17,563.)



(17,553.)

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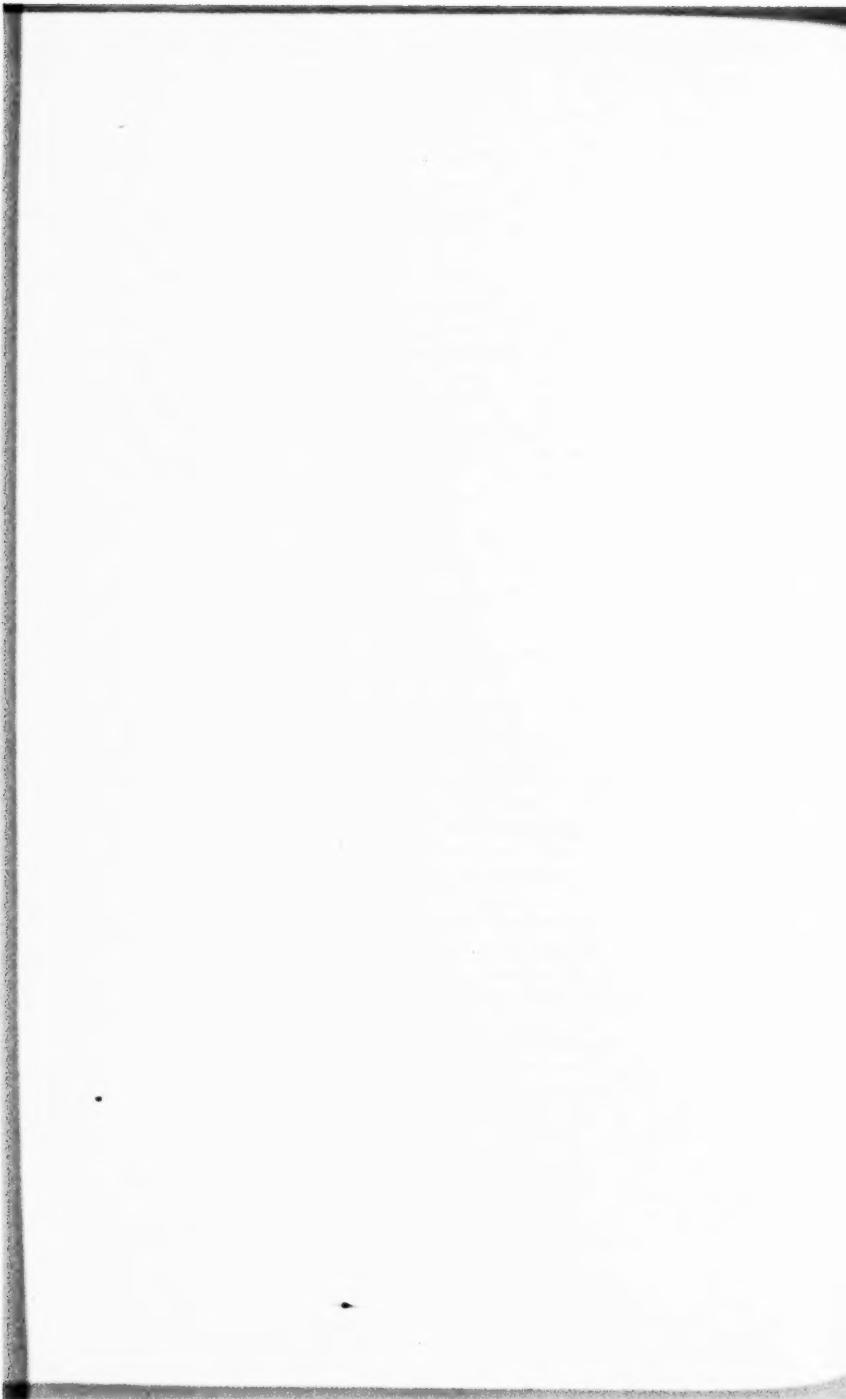
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a UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, being the highest court of law or equity of the State of New York in which a decision could be had in the suit between The People of the State of New York, plaintiffs, and The Adirondack Railway Company, impleaded, etc., defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Adirondack Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly

and openly, you send the record and proceedings aforesaid, b with all things concerning the same, to the Supreme Court of the United States, together with this writ, so you have the same at Washington within thirty days from the date of signing the citation, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the U.S. Circuit Court, Northern District N. Y. Witness the Honorable Melville Weston Fuller, Chief Justice of the United States, the 17th day of October, in the year one thousand eight hundred and ninety-nine.

W. S. DOOLITTLE,
*Clerk of the Circuit Court of the United States
for the Northern District of New York.*

The foregoing writ is allowed this 16th day of October, 1899.

ALTON B. PARKER,
*Chief Judge of the Court of Appeals
of the State of New York.*

c [Endorsed:] In the Supreme Court of the United States. Adirondack Railway Company, plaintiff in error, vs. The

People of the State of New York, defendants in error. Original. Writ of error. R. Burnham Moffat, attorney for plaintiff in error, 63 Wall street, New York city. Filed Oct. 20, 1899.

d In the Supreme Court of the United States, October Term,
1899.

ADIRONDACK RAILWAY COMPANY, Plaintiff
in Error,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error. } Petition for Allowance
of Writ of Error.

To the honorable chief judge of the court of appeals of the State of New York:

The petition of the Adirondack Railway Company respectfully shows:

That on the 3rd day of October, 1899, the court of appeals of the State of New York rendered judgment against your petitioner in a certain cause wherein The People of the State of New York were plaintiffs and appellants and your petitioner was defendant and respondent, reversing an order theretofore made in your petitioner's favor by the appellate division of the supreme court of said State and affirming, with costs, a judgment entered in said suit upon the decision of the special term of said court adverse to your petitioner, as will more fully appear by reference to the record and proceedings in said cause, which are submitted herewith.

That said court of appeals is the highest court of the State of New York in which a decision in said cause could be had.

That your petitioner claims the right to remove said cause and the judgment therein rendered to the Supreme Court of the United States, pursuant to the statutes of the United States in such case made and provided, because manifest error hath been committed in its said judgment by said court of appeals, to the great and lasting damage of your petitioner, in that the validity of a treaty or statute of or an authority exercised under the United States was drawn in question and the decision was against their validity, or the validity of a statute of or an authority exercised under said State of New York was drawn in question, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States was drawn in question and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, all of which will more fully appear by reference to said record and proceedings in said cause herewith submitted.

Wherefore your petitioner, praying for the reversal of said judgment, prays the allowance of a writ of error returnable into the

Supreme Court of the United States and for citation and supersedeas.

And your petitioner will ever pray, etc.

ADIRONDACK RAILWAY COMPANY, *Petitioner.*

R. BURNHAM MOFFAT,
Attorney for Petitioner.

Endorsed: Filed October 20th, 1899.

f Know all men by these presents that we, Acosta Nichols, of 36 East 31st street, New York, and J. Augustus Barnard, of 26 East 35th street, New York, are held and firmly bound unto The People of the State of New York in the just and full sum of five hundred dollars, to be paid to the said The People of the State of New York, their successors or their assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of October, in the year one thousand eight hundred and ninety nine.

Whereas lately, at a session of the court of appeals of the State of New York, at Albany, in a suit depending in said court between the said The People of the State of New York and one The Adirondack Railway Company, a judgment was rendered against the said Adirondack Railway Company, and the said Adirondack Railway Company being about to procure a writ of error and file a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The People of the State of New York, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said

Adirondack Railway Company shall prosecute its said writ
g of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be null and void; otherwise to be and remain in full force and virtue.

ACOSTA NICHOLS. [L. s.]
J. AUGUSTUS BARNARD. [L. s.]

Signed, sealed, and delivered in presence of—

R. BURNHAM MOFFAT.

The foregoing bond is approved this 16th day of October, 1899.

ALTON B. PARKER,
*Chief Judge of the Court of Appeals
of the State of New York.*

I hereby approve the foregoing bond as to form and sufficiency of sureties.

JOHN C. DAVIS,
*Attorney General of the State of New York, Attorney
for Defendants in Error in Court Below,
By EDWARD WINSLOW PAIGE, Of Counsel.*

Endorsed: Filed October 20, 1899.

h STATE OF NEW YORK, ss:

And now here the judges of the court of appeals of New York make return of this writ by annexing hereto and sending herewith under the seal of the court of appeals of New York a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

STATE OF NEW YORK, ss:

To all to whom these presents shall come, Greeting:

Know ye that among the records of our court of appeals, sitting at Albany, on the third day of October, one thousand eight hundred and ninety-nine, it is within contained, the following being, the entire record in the case:

On the twentieth day of March, eighteen hundred and ninety-nine, the appellants, The People of the State of New York, came into our court of appeals, by Hon. John C. Davies, attorney general of the State of New York, their attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court of the State of New York in the third judicial department, reversing the judgment of the special term of said supreme court and ordering a new trial of said cause, and The Adirondack Railway Company, the respondent in the said action, afterwards appeared in the said court of appeals by Lewis E. Carr, its attorney; which said notice of appeal and return thereto annexed are as follows:

*i**Statement under Rule 41.*

This action was commenced by the service of the summons and of a copy of the complaint upon the defendant, The Adirondack Railway Company, on March 25, 1898.

Issue was joined on June 4th, 1898, by the service of the answer of the defendant, The Adirondack Railway Company.

None of the defendants, except The Adirondack Railway Company, have appeared in this action.

The names of the parties in full are:

The People of the State of New York, plaintiffs.

Adirondack Railway Company, Indian River Company, William McEchron, Phoebe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley and John McGinn, defendants.

There has been no change of parties pending suit.

1

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
 against
 ADIRONDACK RAILWAY COMPANY, Indian River Company, William McEchron, Phoebe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn, Defendants. } Trial Desired in Albany County. Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated New York, March 24th, 1898.

T. E. HANCOCK,

Attorney General, Plaintiff's Attorney, Albany, N. Y.

2

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
 against
 ADIRONDACK RAILWAY COMPANY, INDIAN RIVER COMPANY, William McEchron, Phoebe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn, Defendants. } Complaint.

Plaintiffs show to the court, on information and belief:

That in the month of May, 1897, the defendants, Ashley and McEchron, offered to the forest preserve board to sell to the plaintiffs, township number fifteen and about eighteen thousand acres of township thirty-two of Totten and Crossfield's purchase, for the sum of one hundred and forty-nine thousand dollars.

That those two townships lie wholly within the bounds of the forest preserve and also of the Adirondack park.

That on the sixth day of August, 1897, the offer was accepted by the forest preserve board, which then adopted and had regularly entered upon its minutes a resolution in the words and figures following:

"Resolved, That we accept the offer of Mr. McEchron and the other owners of about 18,000 acres of township 32, T. & C., and 24,000 acres of township 15 of the same purchase, including in this total acreage 8,000 acres, more or less, of the virgin forest land, 3 the major portion of the balance of said townships being well wooded, but lumbered of the soft timber, for the sum of \$149,000.

"The above offer to include and carry with it Indian lake (sub-

jeet to the right of the grantors to control the waters thereof so long as they maintain the structures at the outlet), and the improvements and structures at the outlet thereof both existing and in course of construction, and the grubbing, acquiring and clearing of the shores thereof, which shall hereafter be conducted in accordance with the plans and specifications to be furnished by the State engineer and surveyor.

"If the cost of such structures, improvements, acquiring and grubbing and clearing up of the shores of said lake under the plans and specifications of the State engineer be in excess of \$50,000, such excess shall be added to said purchase price; and if less than \$50,000, the difference shall be deducted therefrom."

That said Ashley and McEchron did not own all of the above lands, but they associated with themselves the other defendants, who are human beings, and together with them they formed the defendant Indian River Company, a corporation organized and existing under the laws of New York, and by proper deeds of conveyance vested in it the title to the above lands. That in pursuance of such contract with the forest preserve board, the Indian River Company prepared a deed to the plaintiffs of such lands, and was about to deliver the same, when its delivery was stopped by the injunction hereinafter mentioned.

That the defendant, Adirondack Railway Company, claims to be a railroad corporation organized and existing under the laws of New York and on the eighteenth day of September, 1897, it filed a map and profile for an extension of its railroad across the said township fifteen, and on the thirtieth of September, 1897, it brought against the other defendants the action, the summons and complaint in which are hereto annexed and contained in the papers marked "A." And upon the other papers therein contained, 4 it obtained the injunction therein contained and such further proceedings were had as are therein shown, and the injunction was continued by the order, a copy of which is therein contained.

On the sixth day of October, 1897, the Indian River Company deeded to the plaintiffs the said lands, excepting those described in the said map and survey, and on that day a deed of the lands described in said map and survey was placed in escrow to be delivered when the injunction should be dissolved, and on the same day the State engineer and surveyor and the members of the forest preserve board signed a paper, a copy of which is hereto annexed and marked "B," as their signatures therein appear, filed *in it* the office of the secretary of state and served upon the Indian River Company a notice of the said filing and the date of the filing of the description contained in paper "B," which notice contained the same description of the real property which is contained in paper "B," and on the eleventh of November, 1897, the forest preserve board and the comptroller paid to the Indian River Company the full sum of the purchase-money under the said contract, that is to say, the sum of ninety-nine thousand dollars, and thereupon the plaintiffs, through

their State engineer and surveyor and forest force, entered into possession of said lands.

The Adirondack Railway Company, before the eleventh of November, 1897, began proceedings against the other defendants to condemn the land described in said map and survey, and on the thirtieth day of November, 1897, those proceedings stood, and still stand to be heard on the twenty-first day of December, 1897.

Under the arrangements spoken of in the papers "C," the appeal in papers "A," was taken, noticed to be heard by the appellate division of the court for the second of December, 1897, and was the first case on the calendar for that day.

On the thirtieth of November, 1897, the defendant Ashley signed and sent to the Honorable J. P. Allds papers of which copies 5 are hereto annexed and marked "C," and on the first of December, 1897, he, being the attorney of record for the Indian River Company, and other of the defendants in said action, stipulated the appeal over the term.

That on the 14th day of January, 1898, the said appeal was heard by appellate division and the case was decided by the said appellate division on the second day of March, 1898, and by said decision said court ordered the order affirming the injunction reversed and the injunction dissolved, and thereupon the deed which was placed in escrow was delivered to the People of the State of New York, and has since been recorded.

That, nevertheless, the defendant, The Adirondack Railway Company, is still proceeding with its condemnation proceedings against the other defendants, and has obtained in each proceeding an order for the appointment of commissioners, the other defendants having made substantially no defense, and not having informed the forest preserve board, or any member of the State government of the fact that such proceedings were continuing, and that the defendant, The Adirondack Railway Company, threatens and intends to continue the said proceedings with a view of attempting to acquire title thereby to the said part of township 15.

Wherefore the plaintiffs demand judgment that the defendant, The Adirondack Railway Company, be enjoined temporarily from further continuing the said condemnation proceedings and any condemnation proceedings to take any part of, or any interest in, said lands, and that the other defendants be enjoined temporarily and perpetually from aiding or assisting the Adirondack Railway Company in obtaining any or any interest in any of said lands, and from refraining from opposing it, both in the said action and the said condemnation proceedings, and that the plaintiffs have such other and further relief as to the court shall seem just.

T. E. HANCOCK,
Attorney General, Plaintiff's Attorney.

6 ALBANY COUNTY, ss:

William F. Fox, being duly sworn, says that he has read the foregoing complaint; that the same is true of his own knowledge,

except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WILLIAM F. FOX.

Sworn to before me, 24th day of March, 1898.

WM. G. ARMSTRONG,
Notary Public, Albany County, N. Y.

"A" (*Referred to in Complaint*).

Record on appeal from order continuing injunction in suit of Adirondack Railway Company against Indian River Company and others.

Supreme Court, County of Essex.

<p>ADIRONDACK RAILWAY COMPANY against INDIAN RIVER COMPANY, WILLIAM McECHRON, Phoebe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn.</p>	<p>Preliminary Injunction with Order to Show Cause.</p>
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7 It appearing to my satisfaction from the complaint in this action verified the 29th day of September, 1897, supported by the affidavits of Lewis E. Carr, sworn to said 29th day of September, 1897, and of Charles B. Hibbard, sworn to this 30th day of September, 1897, that the plaintiff demands and is entitled to a judgment against the defendants, among other things restraining them, and each of them, their and each of their agents, attorneys and servants, from conveying or suffering the conveyance, either directly or indirectly, to the forest preserve board or the State during the pendency of this action of so much of that tract of land situated in Warren, Essex and Hamilton counties, and known as "township 15" of the Totten and Crossfield purchase as is comprised within the route adopted by plaintiff over said township, as shown on the maps filed by plaintiff in said counties, except said conveyance be expressly made and received subject to the right of way thereover of the plaintiff's said route;

And it appearing from said complaint that the continuance or commission of said acts during the pendency of this action would produce injury to the plaintiff;

And the plaintiff having duly given an undertaking as required by law;

Now, on motion of Lewis E. Carr, attorney for the plaintiff, it is Ordered, that the defendants, The Indian River Company, William McEchron, Jeremiah W. Finch, Daniel J. Finch, Phoebe A. Hitchcock, Eugene L. Ashley and John McGinn, and each of them, their and each of their agents, attorneys and servants, and all other persons whatsoever, be, and they hereby severally are enjoined and restrained, until the further order of the court in this action, from conveying or suffering the conveyance either directly or indirectly

to the forest preserve board, or to the State, during the pendency of this action, of so much of that tract of land lying in the counties of Warren, Essex and Hamilton, and known as "township 15" on the Totten and Crossfield purchase, as is comprised within the route adopted by plaintiff over said township, as shown on the maps filed by plaintiff in the said counties, except such conveyance be expressly made and received subject to the right of way there-over of the plaintiff's said route.

8 And sufficient reason appearing from the afore-mentioned affidavit of Lewis E. Carr why less than eight days' notice of motion should be given;

Let the defendants, or their attorneys, show cause at a special term of this court, to be held at the court-house in Plattsburg, Clinton county, New York, on the 11th day of October, 1897, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why this injunction should not be continued during the pendency of this action, and why the plaintiff should not have such other and further relief as to the court may seem just.

Leave is hereby granted the plaintiff in support of said motion for the continuance of said injunction, to present upon the hearing thereof additional affidavits, provided a copy of such affidavits shall have been served on or before the sixth day of October, 1897, on the attorneys for such of the defendants as shall then have appeared herein by attorney.

Let this order and a copy of the complaint and affidavits, and a copy of the undertaking as approved by me, be served on or before the 6th day of October, 1897, on such of the defendants as can with reasonable diligence be found within the State of New York, and such service shall be sufficient.

Dated Salem, N. Y., September 30, 1897.

CHESTER B. McLAUGHLIN, J. S. C.

9 Supreme Court of the State of New York.

ADIRONDACK RAILWAY COMPANY <i>against</i> INDIAN RIVER COMPANY, WILLIAM McECH- RON, Phebe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn.	Trial Desired in the County of Essex. Summons.
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To the above-named defendants and to each of them:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated September 29th, 1897.

LEWIS E. CARR,
Plaintiff's Attorney.

Office and post-office address, No. 56 North Pearl street, Albany, New York.

10

Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY

against

INDIAN RIVER COMPANY, WILLIAM MCECHRON, } Complaint.
Phoebe A. Hitchcock, Jeremiah W. Finch, Daniel J. }
Finch, Eugene L. Ashley, and John McGinn.

The plaintiff, by Lewis E. Carr, its attorney, complaining of the defendants, for cause of action, shows upon information and belief:

First. That at all the times hereinafter mentioned, the plaintiff was and still is a domestic railroad corporation, organized and existing under chapter 430 of the Laws of 1874 and the acts amendatory thereof and supplementary thereto, and owned, maintained and operated a line of railway from Saratoga Springs, in the county of Saratoga, to the village of North Creek, in the county of Warren, with the right of extension of its said line from North Creek northward through the counties among others of Warren, Essex and Hamilton.

Second. That the defendant Indian River Company is a domestic corporation, organized and existing under the laws of the State of New York.

Third. That pursuant to the provisions of section six of the Railroad Law of the State of New York, and with the intention of making an extension of its road from North Creek, in the county of Warren, to Long Lake, in the county of Hamilton, there to connect

with the line of the Long Lake Railroad Company, and by 11 means of it and its connecting lines secure a direct route through the counties of Franklin and St. Lawrence, and over the new international railroad bridge, now in process of construction across the St. Lawrence river at Cornwall, to the city of Ottawa, in the Dominion of Canada; and before constructing any part of such extension or instituting any proceedings for the condemnation of real property in either of the counties of Warren or Essex or Hamilton, in which counties in part such extension is to be made, the plaintiff duly made or caused to be made a separate map and profile duly certified by its president and engineer, of the route adopted by it in each of said counties, and caused said maps to be filed on the 18th day of September, 1897, in the offices of the clerks of the counties of Warren, Essex and Hamilton, respectively.

Fourth. That a portion of the route so adopted by plaintiff as aforesaid, passes over a tract of land lying a part thereof in each of said counties of Warren, Essex and Hamilton, which tract is known as "township 15" of the Totten and Crossfield purchase, the title to which tract is owned or claimed to be owned by the defendants herein, some or all of whom are the actual occupants of that portion of said tract over which the route so adopted passes, and are the only actual occupants thereof.

Fifth. That forthwith, upon the filing of said maps and pursuant to the provisions of section six of said railroad law, the plaintiff gave written notice to each of the defendants herein except to the

defendant Jeremiah W. Finch, whom it has not as yet been able to serve, stating the time when and place where each of such maps and profiles was filed, and that the route so adopted by plaintiff passed over lands occupied by them respectively.

Sixth. That said tract known as "township 15" as aforesaid, lies within the limits of the Adirondack park as defined and limited in and by the fisheries, game and forest law, and also within the 12 limits of the forest preserve as defined and limited in and by said law.

Seventh. That section seven of article seven of the constitution of the State of New York provides as follows:

"The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

Eighth. That in and by chapter 220 of the Laws of 1897, entitled "An act to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor," a board known as the "forest preserve board" was constituted, with power, among other things, to acquire for the State, by purchase, lands lying in the territory embraced in said Adirondack park.

Ninth. That the defendants, well knowing the above-stated facts, and further knowing that if title to said "township 15" be once vested in the State, no portion thereof can be taken by this plaintiff for the purposes of its said railroad extension, whether under condemnation proceedings allowed by statute or otherwise, and with the wrongful intention of defeating and forever barring plaintiff of its statutory right to acquire the necessary right of way through and over said "township 15," have threatened to convey forthwith and are about to convey absolutely to the forest preserve board for the State said "township 15," and particularly the portion thereof over which the route so adopted by plaintiff as aforesaid passes, without in anywise limiting such conveyance as subject to plaintiff's right of way over the lands contained within said township, or preserving or suffering the preservation of the statutory rights acquired by plaintiff upon the filing of its maps as aforesaid.

13 Tenth. That the conveyance of said lands by the defendant as aforesaid, except as subject to plaintiff's right of way thereover, will work an irreparable injury to plaintiff, in that it will, under the provisions of the constitution above recited, wholly deprive the plaintiff of its statutory right to acquire said right of way by condemnation proceedings or otherwise, and as the lands adjacent to said "township 15," on either side thereof, said lands being also within the limits of said forest preserve, have already been acquired and are owned by the State, will absolutely deprive plaintiff of its right to extend its road as aforesaid, and put it to a great and irreparable loss.

Eleventh. That unless immediately restrained by order of the court pending this action, the defendants will make their threatened conveyance of said "township 15" as aforesaid to the great and

lasting injury of the plaintiff, and such conveyance would render any judgment which plaintiff may obtain herein wholly ineffectual and impossible of execution.

Twelfth. That the plaintiff is wholly without any adequate remedy at law, and unless this court shall grant its equitable aid and prevent said threatened conveyance and the wrongful and total destruction by defendants of the plaintiff's aforesaid rights, this plaintiff will be remediless in the premises.

Wherefore, plaintiff prays judgment:

1. That an order may be made restraining the defendants and each of them and their and each of their attorneys, agents and servants, from conveying or suffering the conveyance, either directly or indirectly, to the forest preserve board or to the State during the pendency of this action, of so much of said tract known as "township 15" as is comprised within the route adopted by the plaintiff over said township as shown on said maps filed by plaintiff in Warren, Essex and Hamilton counties, except said conveyance be expressly made and received subject to the right of way thereover of the plaintiff's said road.

14 2. That defendants may be perpetually enjoined and restrained from conveying or suffering such conveyance of such portion of said township except as aforesaid.

3. That plaintiff may have such other and further relief as to the court may seem just.

4. That plaintiff may recover the costs of this action.

LEWIS E. CARR,
Attorney for Plaintiff.

STATE OF NEW YORK, }
City and County of New York, }^{ss}:

Charles A. Walker, being duly sworn, says:

I am the secretary of The Adirondack Railway Company, the plaintiff above named. I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is made by me and not by the plaintiff, is that the plaintiff is a corporation.

The sources of my information and the grounds of my belief, as to all matters not stated upon my own knowledge, are as follows:

Organization of the plaintiff company, and its right of extension northward through the counties of Warren, Essex and Hamilton; the organization of the defendant Indian River Company; the filing of the maps and the service of the respective notices thereof, the location of the route through "township 15;" the ownership thereof; the location of said tract within the limits of the Adirondack park and of the forest preserve; the provisions of the constitution of the State of New York, and of chapter 220 of the Laws of 1897; the threatened conveyance of said township to the forest preserve board or to the State, and the legal effect of such conveyance upon the plaintiff's rights, all from statements made to me by

15 the general counsel of the plaintiff company, who has charge or supervision, on behalf of said company, of such matters pertaining to it.

CHAS. A. WALKER.

Sworn to before me this 29th day of September, 1897.

WILLOUGHBY L. WEBB,
Notary Public (138) N. Y. Co.

Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY
against

INDIAN RIVER COMPANY, WILLIAM McECHRON, PHOEBE A. HITCHcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn.

COUNTY OF ALBANY, 88:

Lewis E. Carr, being duly sworn, says:
I am attorney for the plaintiff herein.

The next special term of the supreme court in the county of Essex, where this action is triable, is appointed to be held on the third Monday of October, 1897. This case is not at issue, nor has the summons, which is hereto annexed, as yet been served. A preliminary injunction is prayed for to accompany such summons.

In view of the fact that the conveyance referred to in said complaint is threatened to be made, and as I verily believe will be made, on the first day of October, 1897, and because of the pressing necessity of securing a preliminary injunction at once, it has been 16 impossible in the short space of time since this matter has been placed in my hands to prepare or obtain all the affidavits that I desire to submit on the motion for a continuance of the injunction; and I therefore ask leave to submit upon the hearing of such motion additional affidavits in behalf of the plaintiff in support thereof, with the provision that a copy of such affidavits shall be served at least one day before the return day of said order to show cause upon the attorneys for such of the defendants as shall then have appeared herein by attorney.

The reason that an order to show cause returnable in less than eight days why the preliminary injunction should not be continued *pendente lite* is asked for, instead of giving the customary eight days' notice of motion, is because it is the accepted practice on motions to continue a preliminary injunction, granted to accompany the summons, that an order be made requiring the defendants to show cause why such injunction should not be continued *pendente lite*, and that the restraining force of such preliminary injunction should continue until the hearing of the motion; and said order is made returnable in less than eight days, because by the Code of Civil Procedure and by the General Rules of Practice, orders to show cause, when granted, shall be made returnable in less than eight days.

No previous or other application for an injunction or for an order to show cause herein has been granted.

LEWIS E. CARR.

Sworn to before me this 28th day of September, 1897.

HIRAM W. COWLBECK,
Notary Public, Albany Co.

17

Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY

vs.
INDIAN RIVER COMPANY, WILLIAM McECHRON, ET AL. }

CITY AND COUNTY OF ALBANY, ss:

Charles B. Hibbard, being duly sworn, says:

I am president of the Northern New York Railroad Company, and am a director of the Long Lake Railroad Company referred to in the complaint herein.

Maps of the extension of the plaintiff's road from North Creek to Long Lake, duly certified by the president and engineer of said company, and showing the route adopted in each of the counties of Warren, Essex and Hamilton, were filed on the 18th day of September, 1897, in the offices of the clerks of said counties, respectively, and written notice of the filing of such maps was given to each of the defendants, pursuant to law, except to the defendant, Jeremiah W. Finch, whom it has been impossible as yet to serve with such notice, although diligent effort to that end has been and is being made.

Said route as adopted passes over township 15 of the Totten and Crossfield purchase, which is occupied or owned by some or all of the defendants herein, and by no other persons whatever.

Since the filing of said maps and the service of said notice, and on the 29th of September, 1897, I conversed with the defendant Ashley relative to the threatened transfer by the defendant of said township to the forest preserve board for the State, said Ashley

being also a lawyer and in charge, as I am informed and 18 believe, of the legal matters pertaining to said threatened

transfer. He declined, however, to limit the conveyance which he conceded the defendants were about to make as subject to plaintiff's right of way over said township, although I had pointed out to him and he fully understood that a conveyance without such limitation would wholly deprive plaintiff of its statutory right to acquire the same by condemnation proceedings or otherwise, and would absolutely prevent the construction of said extension. He curtly replied that he would be on hand before the forest preserve board at its meeting on Friday morning, October 1st, and gave me to understand and I verily believe it was and is his intention and the intention of the defendants to convey said township to the State on that morning absolutely and without any reservation or restriction whatever as to plaintiff's right of way thereon. The defendants

Jeremiah W. Finch and William McEchron had previously intimated to me their intention of making such conveyance in total disregard of plaintiff's said rights, and I am informed and believe said board is willing to accept such transfer.

C. B. HIBBARD.

Sworn to before me this 30th day of September, 1897.

C. L. GOVE.

$$[I_{\alpha}, S_{\alpha}]$$

*S. H. GOVLE,
Notary Public, Albany Co., N. Y.*

19 Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY
against
INDIAN RIVER COMPANY ET AL.

CITY AND COUNTY OF NEW YORK, 88:

Charles B. Hibbard, being duly sworn, says:

I am the president of the Northern New York Railroad Company, the New York & Ottawa Railroad Company, and of the Ottawa & New York Railway Company, and am vice-president of the Cornwall Bridge Company. I also have an interest in the Long Lake Railroad Company and in the Raquette River Railroad Company.

The Ottawa & New York Railway Company is incorporated under the laws of the Dominion of Canada and is authorized to construct, maintain and operate a railway from the city of Ottawa to the city of Cornwall, in the province of Ontario, and a railway bridge from the city of Cornwall to the international boundary line.

The Cornwall Bridge Company is a corporation organized and existing under the laws of the State of New Jersey, for the purpose of maintaining and owning a bridge over the St. Lawrence river from the international boundary line to a point in the county of St. Lawrence near the easterly boundary thereof.

The New York & Ottawa Railroad Company is a domestic corporation duly authorized to construct, maintain and operate a railroad from the southerly terminus of said international bridge to the village of Moira.

20 The Northern New York Railroad Company is a domestic corporation owning and operating a line from the village of Moira to the village of Tupper Lake.

The incorporators and directors of the Racquette River Railroad Company, which is duly authorized to construct, maintain and operate a railroad from the village of Tupper Lake to the hamlet of Axton, and the incorporators and directors of the Long Lake Railroad Company, which is duly authorized to construct, maintain and operate a line of railway from said hamlet of Axton to the outlet at the northern extremity of Long lake, have signified to me their readiness to enter into such agreement, traffic or otherwise, as will secure a continuous line under a single management from Ottawa,

in the Dominion of Canada, across said international bridge to the head of Long lake. Said railroad companies, except the Raequette River Railroad Company and the Long Lake Railroad Company, and said bridge company are owned and controlled by a single interest.

The line of railway of the Ottawa & New York Railway Company is now nearly completed and will be ready for train service within a few months at the furthest, as I am informed and verily believe.

The contract for the construction of the international bridge across the St. Lawrence river has been awarded to the Phoenix Bridge Company of Pennsylvania and work thereon has been commenced and the construction of said bridge is being pushed as speedily as possible, and will be continued until completion. Said bridge will be ready for train service not later than the spring or early summer of 1898, as I am informed and verily believe.

The line of the New York & Ottawa Railroad Company is now being graded, a certificate under § 59 of the railroad law having been granted only on the 17th of September, 1897, and the completion of said line will be pushed as rapidly as possible. Said line will be ready for train service not later than the spring or early summer of 1898, possibly before the first of January, 1898, as I am informed and verily believe.

21 The line of the Northern New York Railroad Company is completed and in actual operation. Said line, however, will be improved and the equipment of said road enlarged.

Appreciating the necessity and utility of a line into and through the Adirondack wilderness to connect with the line of the Adirondack railway at North Creek, and thence to Saratoga, Albany and New York, with the numerous connections which such line will afford, I have assisted said Adirondack Railway Company so far as I have been able, in their effort to secure a right of way for the extension of said line from North Creek to Long Lake. During the course of the assistance so rendered by me, I have ascertained and am able to depose as of my own knowledge to sundry facts connected with the location of its said route, and I do depose that on September 18th, 1897, a map and profile of the route adopted by said Adirondack Railway Company in the county of Warren, duly certified by the president and engineer of said company, was filed in the office of the clerk of said county; and that likewise and on said day a map and profile of the route adopted by said Adirondack Railway company in the county of Hamilton, duly certified by the president and engineer of said company, was filed in the office of the clerk of said county of Hamilton; and that on said day a map and profile of the route adopted by said Adirondack Railway Company in the county of Essex, duly certified by the president and engineer of said company, was filed in the office of the clerk of said county of Essex.

And I do further depose of my own knowledge that the surveys for said road were made between the first of September, 1896, and the first of June, 1897.

A portion of the route so adopted by the Adirondack Railway Company crosses the tract of land known as township 15 of the Totten and Crossfield purchase, which township lies a part thereof in Warren county, a part thereof in Hamilton county and a part thereof in Essex county. The route so adopted passes over each of 22 said parts. Said lands are wild lands, no portion of the route adopted by the plaintiff in said township being under cultivation.

I am informed and believe that the defendants are the owners of said township, the sources of my information and the grounds of my belief being statements to that effect made to me by sundry of the defendants themselves.

Written notice of the filing of said maps, pursuant to § 6 of the railroad law, was, between the 18th and 25th days of September, 1897, given to the several defendants herein, except to the defendant Jeremiah W. Finch, as I am informed and believe. The sources of my information and the grounds of my belief are the written statements of Smith Philley, William D. Carr, and John J. Healey, Jr. The reason their affidavits are not hereto annexed is that they are none of them present or accessible to me and I cannot obtain their affidavits in time for their service upon such attorneys for the defendants as shall have appeared herein on or before the sixth of October, 1897, which, as I am informed and believe, is the time limited in the order of Mr. Justice McLaughlin for the service of additional affidavits in support of the injunction obtained by plaintiff herein. Since the commencement of this action a written notice of the filing of said maps in each of said counties was served upon the defendant Jeremiah W. Finch. Said service was effected on the 1st day of October, 1897, as appears from the affidavit of Joseph E. Haggerty, hereto annexed. Each of such written notices so served upon the defendants stated the time and place such maps and profiles respectively were filed and that the route adopted by said Adirondack Railway Company passed over the lands occupied by them respectively. I know this to be the fact from having seen said notices.

The route adopted by said Adirondack Railway Company enters upon said township 15 on the southerly boundary thereof and leaves it on the northerly boundary thereof.

Said township is bounded on the easterly by lands already acquired by the State and on the westerly by township 32 of 23 the Totten & Crossfield purchase. A part of said township 32 is owned by the State absolutely and a part thereof in a joint and undivided ownership with other persons. I have been informed by the defendant Ashley and by one Spier, the secretary of the Indian River Company, and by the counsel who represented them on the application made on the 4th of October, 1897, before Mr. Justice McLaughlin to vacate upon the papers the preliminary injunction obtained by plaintiff herein that township 32 is also owned by these defendants, and that they have contracted to sell the same to the State. If such sale be consummated, as I verily believe it will be, and if township 15 be also acquired by the State

without the reservation of the statutory right belonging to plaintiff to acquire a right of way thereover, it will be impossible by reason of the inhibition contained in article 7 of § 7 of the constitution for plaintiff to avail itself of its right to extend its line of road from North Creek to Newcomb and thence to Long Lake.

Plaintiff has already acquired by purchase portions of its rights of way in other townships over which its route as adopted passes.

CHARLES B. HIBBARD.

Sworn to before me this 5th day of October, 1897.

WILLOUGHBY L. WEBB,
Notary Public (138), N. Y. Co.

24

Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY }
against
INDIAN RIVER COMPANY ET AL. }

CITY AND COUNTY OF NEW YORK, ss:

David Willcox, being duly sworn, says:

I am the general counsel and a director of the plaintiff herein, and have been such since the year 1889. I have become thoroughly familiar with the past history of the property.

Said plaintiff is a domestic railroad corporation, organized under the provisions of chapter 430 of the Laws of 1874 and the acts amendatory thereof and supplementary thereto. Its articles of association were filed and said company was incorporated on July 7th, 1882.

Said plaintiff is the successor in interest and rights of the "Adirondack Company," the articles of association of which company were filed in the office of the secretary of state on October 24, 1863, pursuant to chapter 236 of the Laws of 1863, entitled "An act to facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of this State, and the development of the resources thereof." Said articles of association recited that the places from and to which said railroad should be constructed, maintained and operated, among others, were as follows:

" 1. From some point in the town of Hadley, in the county of Saratoga, up and along the valley of the upper Hudson to some point in the town of Newcomb, in the county of Essex."

25 And the names of the counties in which the railroad is to run are, among others, Saratoga, Warren, Essex, and Hamilton.

By chapter 250 of the Laws of 1865, said Adirondack Company was authorized to amend its articles of association so as to enable it under the general law to extend its railroad to some point on Lake Ontario or on the River St. Lawrence. Pursuant to the authority contained in said act said Adirondack Company on March

1st, 1871, filed in the office of the secretary of state its amended articles of association, wherein it was recited that in addition to the places from and to which the railroad of said company was to be constructed, maintained and operated, as stated in its original articles of association, said railroad was to be constructed, maintained and operated from a point in the town of Newcomb, in the county of Essex, to a point on the River St. Lawrence, in the town of Oswegatchie, in the county of St. Lawrence.

By chapter 864 of the Laws of 1872, entitled "An act to authorize the Adirondack Company to construct and operate a branch of its railroad from its main line to the northern bounds of the State," said Adirondack Company was authorized to construct and operate such branch, to commence at some point on its line between the south line of the town of Thurman, in the county of Warren, and the north line of the town of Newcomb, in the county of Essex, and running thence to the northern bounds of this State, in either of the towns of Mooers or Champlain, in the county of Clinton.

Under the authority thus conferred upon it by law, said Adirondack Company, after its incorporation, laid out its line of road, and thereafter constructed and put in operation sixty miles thereof, or thereabouts, from Saratoga to the village of North Creek, in the county of Warren.

All the property, rights, privileges and franchises of said Adirondack Company were duly sold under the foreclosure of a mortgage thereon, and upon the incorporation of the plaintiff company, in the year 1882, all of said property, rights, privileges and franchises of said Adirondack Company were thereupon transferred to 26 and became vested in said plaintiff company, and the same have at all times since and now are vested in said plaintiff.

In order to relieve itself from the obligation of then constructing the entire length of its line beyond the portion thereof constructed at the time it acquired title to said railroad properties and franchises which were formerly of the Adirondack Company, said plaintiff not deeming it expedient to extend its road at that time beyond North Creek, did in or about the month of April, 1892, pursuant to section 83 of the railroad law, make application to the board of railroad commissioners of the State of New York for a certificate relieving said railroad company from the obligation or necessity of then completing the extension of its said line; and thereafter and on or about the 9th day of May, 1892, said board of railroad commissioners issued its certificate certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road of the Adirondack Railway Company beyond the portion thereof constructed at the time the said company acquired title to said railroad property and franchises, namely, beyond North Creek, in the county of Warren.

Thereafter and during the summer of 1897, the New York & Ottawa Railroad Company was incorporated under the laws of the State of New York, with the right to construct a line of railroad from a point on the south bank of the St. Lawrence river, in St. Lawrence county, to the village of Moira, where it will connect with the

line of the Northern New York Railroad Company, now running and in actual operation from said village of Moira to the village of Tupper Lake, in the county of Franklin. The board of railroad commissioners on September 17th, 1897, as I am informed and believe, granted to said New York & Ottawa Railroad Company a certificate under section 59 of the railroad law.

As I am informed and believe, an international bridge is now in process of construction across the St. Lawrence river from the northern terminus of said New York & Ottawa Railroad

27 Company to the city of Ottawa, in the Dominion of Canada, and a new line of railway known as the Ottawa & New York Railway Company, incorporated under the laws of the Dominion of Canada, as I am informed and believe, has nearly completed the construction of its line of road from Cornwall to the city of Ottawa.

As I am also informed and believe, the certificate of incorporation of the Racquette River Railroad Company was filed with the secretary of state on or about the 27th of April, 1895, the line of road to be constructed, maintained and operated by said railroad company to be from said village of Tupper Lake to the hamlet of Axtun, all in the county of Franklin; and on or about the first day of July, 1895, the board of railroad commissioners granted to said Racquette River Railroad Company a certificate under section 59 of the railroad law.

As I am further informed and believe, on or about July 5th, 1895, the certificate of incorporation of the Long Lake Railroad Company was filed in the office of the secretary of state, the line to be constructed, maintained and operated by said railroad company to be from the said hamlet of Axtun to the outlet at the northern extremity of Long Lake, all in the county of Franklin and the county of Hamilton; and thereafter and on or about the 13th day of January, 1897, and pursuant to the order of the appellate division of the supreme court for the third department, entered December 14th, 1896, the board of railroad commissioners issued to said Long Lake Railroad Company a certificate under section 59 of said railroad law.

The sources of my information and the grounds of my belief as to the dates and matters above stated upon information and belief, are certified copies of the certificates of incorporation, and statements made to me by the counsel for said New York & Ottawa Railroad Company, said Northern New York Railroad Company, said bridge company, and said Ottawa & New York Railway Company.

Since the granting of the charters and the commencement of construction of a continuous line from the outlet, at the northern extremity, of Long Lake to the city of Ottawa, in the Dominion of Canada, said Adirondack Railway Company has deemed it both expedient and necessary to extend its line northward from North Creek to the said northerly terminus of Long Lake, there to connect with said continuous line of railway aforementioned. Furthermore, in view of the provisions of article

seven of section seven of the constitution of the State of New York, which requires that land within the limits of the forest preserve once acquired by the State shall forever remain wild land, which provision may be held to prevent said railway company from extending its route northward after acquisition by the State of said lands, and to render said forest preserve and Adirondack park available to those who would use it for the purpose designed by the act limiting said Adirondack park, and at the urgent solicitation of persons interested in the locality to be affected thereby, said plaintiff company deems it expedient now to extend its railroad from North Creek to Long Lake, a distance of forty miles, or thereabouts, and intends in good faith to acquire said lands by purchase or by condemnation, and to construct forthwith its line of railway thereon.

The route adopted by the plaintiff company for its extension from North Creek, as shown on the maps filed in the counties of Warren, Essex, and Hamilton, extends through parts of Warren, Hamilton and Essex counties to the town of Newcomb, and thence through Essex and Hamilton counties to the outlet at the northern extremity of Long Lake aforesaid. By connecting at Long Lake with the line of said Long Lake Railroad Company and its connecting lines, said Adirondack Railway Company will have a direct railroad connection by means of the Long Lake railroad, the Racquette River railroad, the Northern New York railroad, and the Ogdensburg & Lake Champlain railroad, with the northern boundary of the said State in the town of Mooers, in the county of Clinton.

Said plaintiff has acquired by purchase a portion of its right of way from North Creek to Long Lake as described on said maps, and desires to preserve its statutory right to acquire the right of way located by it across "township 15" of the Totten and Crossfield purchase. No part of said road from North Creek to Long Lake has as yet been constructed, nor has any condemnation proceeding as yet been instituted.

DAVID WILLCOX.

Sworn to before me this 5th day of October, 1897.

WILLOUGHBY L. WEBB,
Notary Public (138), N. Y. Co.

STATE OF NEW YORK, {
City and County of New York, {^{ss:}

Joseph E. Haggerty, being duly sworn, says:

I am of the age of twenty-one years and upwards, and reside in the city of Brooklyn, in the State of New York.

On the first day of October, 1897, at the Atlanta hotel, Asbury Park, in the State of New Jersey, between the hours of 3.30 and 4.00 in the afternoon of said day, I served written notices of the filing of the map and profile of the route adopted by the Adirondack Railway Company in the counties of Warren, Hamilton and Essex, re-

spectively, upon Jeremiah W. Finch, by then and there delivering such written notices to and leaving the same with him.

And at the time of such service I knew the person to whom such notice was so delivered to be said Jeremiah W. Finch.

JOSEPH E. HAGGERTY.

Sworn to before me this 5th day of October, 1897.

[L. s.]

WILLOUGHBY L. WEBB,
Notary Public (138), N. Y. Co.

30

Supreme Court.

ADIRONDACK RAILWAY COMPANY

against

INDIAN RIVER COMPANY, WILLIAM McECHRON, PHOEBE A. }
Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. }
Ashley, and John McGinn. }

WARREN COUNTY, 88:

Eugene L. Ashley, being duly sworn, says that he is an attorney and counselor of the supreme court, and one of the defendants in the above-entitled action, and that, in connection with William McEchron, William E. Spier and others, deponent commenced negotiations with State Engineer Adams, who then was and is one of the forest preserve board, and who acted in behalf of the State, and deponent and others made an offer to said board to sell to the State of New York township No. fifteen and about eighteen thousand acres of township thirty-two, of Totten & Crossfield's purchase, as early as in the month of May last; that said negotiations were continued from time to time with said Adams and the other members of said board down to the 6th day of August, 1897, when said offer of deponent, said McEchron and others was accepted by said board, which, at a regular meeting thereof, on the last-mentioned day, adopted a resolution, of which the following is a copy, to wit:

"Resolved, That we accept the offer of Mr. McEchron and the other owners of about 18,000 acres of township 32, T. & C., and 24,000 acres of township 15 of the same purchase, including in this 31 total acreage 8,000 acres more or less of virgin forest land, the major portion of the balance of said townships being well wooded but lumbered of the soft timber, for the sum of \$149,000.

The above offer to include and carry with it Indian lake (subject to the right of the grantors to control the waters thereof so long as they maintain the structures at the outlet) and the improvements and structures at the outlet thereof both existing and in course of construction, and the grubbing, acquiring and clearing of the shores thereof, which shall hereafter be conducted in accordance with the plans and specifications to be furnished by the State engineer and surveyor.

If the cost of such structures, improvements, acquiring and grubbing and clearing up of the shores of said lake under the plans and

specifications of the State engineer, be in excess of \$50,000 such excess shall be added to said purchase price; and if less than \$50,000 the difference shall be deducted therefrom."

That deponent, said McEchron and others acting with them, did not then own all of said township 15 and of the 18,000 acres of said township 32, but on the strength and faith of the contract made with said board as aforesaid, and at great cost and expense, made arrangements, purchases and bargains before the filing of said map on the 18th day of September, 1897, whereby they became and were in a position to transfer a good title in fee to said State of all of said lands, and were able to perform said contract on their part with said board.

That prior to the time of making said agreement with said board, deponent, said McEchron and others acting with them in the premises, had not, nor had any or either of them, so far as deponent has any knowledge, information or belief any knowledge or information that the plaintiff was intending or contemplating instituting any proceedings to acquire a right of way through, over or across said township number 15, or through, over or across any part thereof. That while it is stated in one of the affidavits on which the motion

here is founded that the survey for the proposed railroad was 32 made between September, 1896, and June, 1897, no explanation or reason is assigned or given why the maps, &c., were not filed till about a month and a half after said contract had been made by said board with deponent, said McEchron and others. Deponent further states on information and belief, that it was not till after the promoters of said proposed railroad had heard of the bargain to sell said land to the State as aforesaid that they took any steps to file maps or any other proceedings looking to procuring a right of way over said lands: deponent further states, on information and belief, that it was in consequence of the contemplated action of deponent, said McEchron and others who acted in concert with them, and of said board, to consummate said bargain by a transfer of the lands as aforesaid to the State, that the plaintiff filed said maps or took any steps showing any intention to avail itself of any condemnation proceedings of said land.

Deponent denies, in the broadest and most unequivocal terms, each, every and all of the allegations of any wrongful or other intention whatever of deponent (or of each, any and every defendant in this action, so far as deponent has any knowledge, information or belief), of defeating or barring plaintiff of any statutory or any other right whatever. That all the proceedings on the part of deponent, said McEchron and others whatever in, concerning, or about said negotiations and contract to sell said lands to the State, were taken and had in good faith and solely to realize on said property and for the purpose of obtaining the consideration therefor from and on the part of the State, and without any intention to injure plaintiff, or any one, or any other intention than to consummate said trade in good faith and reap the fruits of their bargain.

EUGENE L. ASHLEY.

Subscribed and sworn to before me this 15th day of October, 1897.

CASS C. LA POINT,
Notary Public, Warren Co.

33 WARREN COUNTY, 88:

William McEchron, being duly sworn, says, that he is one of the defendants in the foregoing-entitled action, and is the president of The Indian River Company, another defendant in said action; that deponent has heard read the preceding affidavit in the foregoing-entitled action, made by Eugene L. Ashley, and verified on the — day of October, A. D. 1897, and that the same is true and correct in all respects, and as to each, every and all the statements and denials therein contained, so far as deponent has any knowledge, information or belief as to or concerning said statements and denials.

WM. McECHRON

Subscribed and sworn to before me this 15th day of October, 1897.

CASS C. LA POINT,
Notary Public, Warren Co.

Supreme Court.

**ADIRONDACK RAILWAY COMPANY, Plaintiff,
against**

against

INDIAN RIVER COMPANY, WILLIAM McECHRON, PHEBE A. HITCHCOCK, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn, Defendants.

Application having been made by and on the part of the plaintiff to postpone the hearing on the order to show cause in this 34 action, returnable at a special term of this court, at the courthouse in Plattsburg, on the 11th day of October, 1897, until October 16th, 1897:

Now, therefore, for the accommodation of the plaintiff, and in consideration of its agreements hereinafter contained, it is hereby stipulated and agreed as follows:

First. That the hearing on said order to show cause stand over to be heard at a special term on the 16th day of October, 1897, at the court-house, in Plattsburg, at 10 o'clock a. m. of that day.

Second. That the rights of all parties hereto shall be the same at the time of and on the hearing, and decision on said order to show cause as though there had been no postponement of such hearing—not only as to the motion or order to show cause, but also in all other proceedings and respects by or on the part of the plaintiff for acquiring any title to any of the land mentioned or described in the complaint herein—that the intervening time between October 11th, 1897, at 10 o'clock a. m., and the time of hearing and decision on said order to show cause shall not count, nor be considered in

any computation of time in or as to any proceeding, nor as to the lapse of any time required by law or otherwise for any step, steps or proceedings as a foundation or condition precedent for any subsequent or other proceedings whatever for or towards condemnation proceedings in land in township 15 of Totten and Crossfield's purchase.

It is the intention of the parties that neither party shall gain or use any rights or advantages by such postponement, and that the rights of the parties in all respects on the hearing of said order to show cause shall be the same as though it was heard and decided at the time it was originally returnable.

In the event, however, of the adjournment of the special term appointed to be held October 11th, 1897, because of the inability of Judge Kellogg to attend and hold the same on that day, the limitations contained in this stipulation as to proceedings and acquiring

new rights shall only apply to the period between the time
35 when said order to show cause might have been heard in due course, and the date above mentioned to which the postponement thereof is herein made.

Dated October 9th, 1897.

LEWIS E. CARR, *Att'y for Plff.*
S. & L. M. BROWN, *Att'ys for D. J. Finch.*
ASHLEY, WILLIAMS & FOWLER,
Att'ys for Indian River Co.

At a special term of the supreme court, held in and for the county of Clinton, at the court-house in the village of Plattsburg, N. Y., on the sixteenth day of October, 1897.

Present: Hon. S. A. Kellogg, justice.

Supreme Court, Essex County.

ADIRONDACK RAILWAY COMPANY, Plaintiff,
against

INDIAN RIVER COMPANY, WILLIAM McECHRON, PHEBE A. HITCHCOCK, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn, Defendants.

An order having heretofore and on the thirtieth day of September, 1897, been granted by Hon. Chester B. McLaughlin, 36 justice, restraining the defendants and each of them, their and each of their agents, attorneys and servants and all other persons whatsoever until the further order of the court in this action from conveying or suffering the conveyance either directly or indirectly to the forest preserve board or to the State during the pendency of this action of so much of that tract of land lying in the counties of Warren, Essex and Hamilton and known as township 15 on the Totten and Crossfield's purchase as is comprised within the route adopted by plaintiff over said township as shown on the maps filed by plaintiff in the said counties except such conveyance be expressly made and received subject to the rights of

way thereover of the plaintiff's said route and requiring the defendants to show cause at special term of this court to be held at the court-house in the village of Plattsburgh, N. Y., on the 4th day of October, 1897, why the injunction so granted should not be continued during the pendency of this action, in and by which order the plaintiff was authorized to make use of additional affidavits in support of said injunction, provided the same were served on the attorneys for the defendants appearing on or before October 6th, 1897, and the hearing on said order to show cause having been by stipulation adjourned to this day and the same having, pursuant thereto, come on to be heard and the plaintiff filing proof of service of said injunction and order to show cause on all of the defendants, together with proof of service of additional affidavits in support of said injunction served on Eugene L. Ashley, the only attorney appearing for the defendants herein, on reading and filing said original papers and the additional affidavits of David Wilcox and Charles B. Hibbard in support of said injunction, and the affidavit of Eugene L. Ashley in opposition thereto, after hearing Lewis E. Carr, attorney for the plaintiff, in support of said injunction and for the continuance thereof, and Stephen Brown, of counsel for the defendant, in opposition thereto, and it appearing that an application for the vacation of such injunction upon the papers on which it was granted was made to the justice granting the same and denied, and it further appearing that the affidavit in opposition to 37 said injunction does not change in any material respect the questions presented, it is now, on motion of Lewis E. Carr, attorney for the plaintiff,

Ordered that said injunction be and the same hereby is continued during the pendency of this action, and until the further order of the court in the premises.

Enter in Essex county.

S. A. KELLOGG,
Jus. Sup. Ct.

Supreme Court.

ADIRONDACK RAILWAY COMPANY }
 against }
INDIAN RIVER COMPANY and Others. }

SIRS: Take notice that all of the defendants appeal to the appellate division of the supreme court for the third department from the order made herein sixteenth October, 1897, and from the whole thereof.

Very truly,

EUGENE L. ASHLEY,
S. AND L. M. BROWN,
Attorneys for the Defendants.

22 October, 1897.

To Lewis E. Carr, Esq., plaintiff's attorney, and the clerk of Essex county.

38 COUNTY OF ESSEX, }
Clerk's Office, }
ss:

Supreme Court.

ADIRONDACK RAILWAY COMPANY }
against }
INDIAN RIVER COMPANY and Others. }

I, A. S. Prime, clerk of the county of Essex and also of the supreme court for that county, do certify that the annexed are copies of the order made in the above action, at a special term held at Plattsburgh, on the sixteenth of October, 1897, and entered in Essex county on the 25th of October, 1897, and of the papers on which the same was made and the notice of appeal from the same, on file in this office. In witness whereof I have hereunto set my hand and the seal of the county of Essex, this twenty-third day of November, 1897.

[SEAL.]

A. S. PRIME, Clerk,
By V. W. PRIME, Deputy.

SCHENECTADY, ss:

Edward Winslow Paige, being duly sworn, says that as he is informed and believes Mr. Justice Kellogg made no written opinion, but that on an application to Mr. Justice McLaughlin to vacate the injunction on the papers on which it was granted, the latter justice delivered an opinion of which the annexed is a copy.

EDWARD WINSLOW PAIGE.

Sworn before me this 22d November, 1897.

EDWARD D. PALMER,
Notary Public.

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Supreme Court.

THE ADIRONDACK RAILWAY COMPANY }
ag'st }
THE INDIAN RIVER COMPANY and Others. }

Motion to vacate injunction pending an order to show cause why it should not be continued during the pendency of the action, and heard by Mr. Justice McLaughlin at the request of and for the convenience of counsel, at the Hotel Manhattan, in the city of New York, on the 4th day of October, 1897.

Mr. E. T. Brackett and Mr. E. L. Ashley appeared as counsel for the Indian River Company.

Mr. William McEchron and Mr. E. L. Ashley appeared in favor of the motion.

Mr. Stephen Brown also appeared as counsel for the Indian River Company, in favor of the motion.

Mr. G. D. Hasbrouck appeared on behalf of the State, especially for the purpose of being heard on the question of dissolving the injunction.

Mr. Lewis E. Carr and Mr. R. Burnham Moffat appeared as counsel for the plaintiff in opposition to the motion.

The plaintiff objected to any one appearing or being heard unless they were parties to or had an interest in the subject-matter of the action.

Mr. Brackett said: On behalf of the persons for whom I appear as counsel, I shall welcome assistance from the State, the forest preserve board, or from any other source. I differ from the attorney general that this is a proceeding upon notice, or that any one is entitled to be heard except counsel representing parties to or having

an interest in the subject-matter of the action. The application is an *ex parte* one to dissolve an injunction granted *ex parte*, made upon the papers upon which it was originally granted, and to the judge who granted it. And while I have no wish other than the motion should be presented in an orderly manner, I think that the deputy attorney general, Mr. Hasbrouck, should be permitted to state the case and join in the request for dissolution if he sees fit to do so.

The objection to the deputy attorney general, Mr. Hasbrouck, appearing, was overruled, and he was permitted to be heard.

In deciding the matter Mr. Justice McLaughlin said: "The statute confers upon a railroad corporation the power to exercise the right of eminent domain. The plaintiff in pursuance of this power has attempted to exercise this right by taking the first steps toward the purchase or condemnation of the land in question. On the 18th day of September, 1897, it filed a map and profile of the routes adopted by it in the counties of Essex, Warren and Hamilton, where the lands are situate, and on the 23d of the same month it served upon all the owners of the lands except one the time when and the place where such plans and profile were filed.

Under the terms of the statute the plaintiff can take no further steps to acquire the fee to the route in question until after the expiration of fifteen days from the time this notice was given. This time, the fifteen days, is given to the owners for the purpose of enabling them to point out a different route than the one selected by the corporation. The fifteen days have not yet expired, and pending their expiration the plaintiff charges that the defendants have threatened and intend to prevent its taking the lands by deeding them to the State; and the plaintiff has brought this action to restrain them from so doing. The complaint specifically charges that the defendants, with the wrongful intention of depriving and barring the plaintiff of its statutory right to acquire the necessary right of way over the lands referred to, have threatened to and are forthwith about to convey absolutely to the forest preserve board, for the State, the lands referred to, and that such conveyance is

41 made for the purpose of depriving the plaintiff of its right to construct its road across their lands. Upon this complaint

and the affidavit attached to it the injunction here sought to be vacated was granted; and the court is now asked to vacate it upon the same papers, upon the ground that the plaintiff was not,

and is not now, entitled to enjoin the defendants from doing what it is alleged they are about to do.

It must be assumed, therefore, for the purpose of this motion, that all the allegations of the complaint are true. Assuming them all to be true, I think a proper case is presented for the interference of a court of equity. The initial steps have been taken by the plaintiff to acquire the right of way across the defendants' lands, either by purchase or condemnation proceedings. The statute prevents the plaintiff doing anything further until after the expiration of fifteen days. The delay of fifteen days, which the plaintiff is subjected to, is solely for the benefit of land-owners. It seems to me it was the intention of the legislature that, after the plaintiff has taken the initiatory steps under the statute referred to, by filing its map and profile and giving the notice required, it should have intermediate the giving of the notice and the expiration of the fifteen days a right to the route which is impressed upon or attached to the land; something in the nature of an equitable lien, which the court should protect. To give this statute any other construction is to hold that the owners of the land have the power during the fifteen days accorded to them to point out another route, to repeal the statute itself. No such intention can be imputed to the legislature. The right to locate its line of road is delegated to the corporation by the legislature, and this right carries with it, or confers upon it, a further or subsequent right to condemn the land if needed for the road. When, therefore, the plaintiff made and filed its map indicating the route it intended to adopt for the construction of its road, gave the required notice, that moment it so far acquired a right to thereafter construct and operate a road upon that line unless changed by the land-owners, that it cannot be deprived of it during the fifteen days accorded to the owners to point out another way.

42 While it cannot be said that the plaintiff has as yet acquired any interest in the land itself, yet it certainly has acquired something in the nature of a right which by its hereafter complying with the terms and provisions of the statute may ripen into a title. The right which it now has, whatever it may be called, cannot be taken from it by the owners of the land so long as the statute which gives it a right to condemn land remains in force.

For these reasons I think the application to vacate the injunction should be denied.

"B."

(Here follows a copy of the certificate of condemnation. Same introduced in evidence as Plaintiff's Exhibit 11, below.)

"C."

Law office of Ashley & Williams, Glens Falls, N. Y.
Eugene L. Ashley, Henry W. Williams, and Albert N. C. Fowler.

Nov. 29TH, 1897.

Hon. J. P. Allds, forest preserve board, Albany, N. Y.

DEAR SIR: Enclosed herewith I hand you a copy of a letter which I received from Mr. Lewis E. Carr together with a copy of my reply, Both of which have been submitted to Judge Brown. While we are both willing that our name should be used in prosecuting the appeal in this proceeding, yet, we are not willing that our names should be used in any manner unprofessional, or in any way that will bring upon us reproach in matters of practice.

If there has been any sharp practice or any underhanded dealings with Mr. Carr in any proceedings bearing our name or in which we are interested, it will have to be righted by those who have been instrumental in doing the things complained of, or

43 we shall take the matter of so doing in our own hands.

While our clients are willing, and in fact anxious to do all they can to serve the needs of the forest preserve board, and the State, literally in accordance with the understanding which was had at the time the matters were closed up, yet, I am not willing that anybody should practice law in my name in any unprofessional or underhanded manner, and so far as I represent the clients which I do I shall right all wrongs which are perpetrated in my name and I shall not be a party to anything that is not strictly professional and above reproach in every respect.

Mr. Carr asks for a postponement of the case until next term because of professional engagements and I think, under the circumstances, it should be granted.

Yours truly,

EUGENE L. ASHLEY.

Law office of Ashley & Williams, Glens Falls, N. Y.

Eugene L. Ashley, Henry W. Williams, Albert N. C. Fowler.

(Dictated E. L. A.)

Nov. 29TH, 1897.

Hon. J. P. Allds, Albany, N. Y.

DEAR SIR: Since writing you this morning I have conferred with Judge Brown on the subject of Mr. Carr's letter,—Mr. Carr having written to Judge Brown on the same subject,—and it seems to us that, under the circumstances, we should stipulate to let these cases go to the next term, we see no reason why we should not do so, and Judge Brown is quite decided in his views on the subject as well as myself. We believe in being strictly professional and courteous in our practice, and recognizing the engagements of a busy man, we

44 get in the hole some time ourselves, but we expect to practice law for some time to come and will be continuously meeting Mr. Carr.

We do not know why we should treat him differently in this case than we should in any other. I trust you will agree with me on the subject, and consent that this case go over the term without further discussion.

Yours truly,

EUGENE L. ASHLEY.

(Enclosures.)

P. S.—You will remember Mr. Carr's courtesy to us when we asked for a postponement of the proceedings which he had noticed at Caldwell, and it occurs to me that we should extend to him the same courtesy now which he then extended to us.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK

against

ADIRONDACK RAILWAY COMPANY, INDIAN RIVER COMPANY, WILLIAM MCECHRON, PHEBE A. HITCHCOOK, JEREMIAH W. FINEH, DANIEL J. FINEH, EUGENE L. ASHLEY, AND JOHN MCGINN.

Answer of Defendant Adirondack Railway Company.

The Adirondack Railway Company, one of the defendants above named, answering the complaint herein by Lewis E. Carr, its attorney:

First. Admits that township number fifteen and township 45 number thirty-two of Totten and Crossfield's purchase lie wholly within the bounds of the forest preserve and also of the Adirondack park.

Second. Admits, upon information and belief, that on or about the 6th day of August, 1897, the forest preserve board adopted and had entered upon its minutes a resolution in the words and figures set forth in said complaint; and said defendant denies all knowledge or information sufficient to form a belief as to any offer having been made in the month of May, 1897, by the defendants Ashley and McEchron to the forest preserve board to sell to the plaintiffs for the sum of one hundred and forty-nine thousand dollars township number fifteen, and about eighteen thousand acres of township number thirty-two of Totten and Crossfield's purchase, or as to any such offer, if made, having been accepted by the forest preserve board on the sixth day of August, 1897.

Third. Admits, upon information and belief, that the defendants, Ashley and McEchron, on the 6th day of August, 1897, did not own all of the lands referred to in said resolution of the forest preserve board, and admits upon information and belief that subsequently to said date they associated with themselves the other defendants herein, who are human beings, and together with them formed defendant Indian River Company, a corporation organized and existing under the laws of New York, and that said defendants subsequently executed and delivered to said Indian River Company divers deeds purporting to convey title to said lands to said Indian

River Company; but this defendant denies that the title to all of the above lands was conveyed to or vested in said Indian River Company, or that the deeds referred to were delivered to said Indian River Company until long after this defendant had secured a lawful right to construct the line of its railway across said township fifteen.

46 Fourth. Admits, upon information and belief, that the Indian River Company prepared a deed to the plaintiffs of the lands referred to in said resolution of the forest preserve board, and was about to deliver the same when its delivery was stopped by the injunction hereinafter mentioned. And this defendant avers upon information and belief that at the time of the preparation of said deed and the service of said injunction the Indian River Company was not vested with the title to all of said lands.

Fifth. Admits that the defendant Adirondack Railway Company claims to be and avers that it is a railroad corporation organized and existing under the laws of the State of New York, and that on the 18th day of September, 1897, it filed in the offices of the clerks of Warren, Hamilton and Essex counties, respectively, a map and profile for an extension of its railroad across said township fifteen, and that on the 30th day of September, 1897, it brought an action against the other defendants herein, a copy of the summons and complaint in which action *are* contained in the papers annexed to the complaint herein marked "A;" and that upon the summons and complaint and the affidavits of Lewis E. Carr and Charles B. Hibbard, whereof also copies are contained in said papers marked "A," it obtained the injunction order, whereof a copy is contained in said papers marked "A," and that such further proceedings were had as are shown in said papers marked "A," that the injunction was continued *pendente lite* by the order, whereof a copy is also contained in said papers marked "A."

Sixth. Admits, upon information and belief, that on the 6th day of October, 1897, the Indian River Company deeded to the plaintiffs the lands referred to in said resolution of the forest preserve board, excepting those described in the maps and profiles so filed by this defendant for an extension of its railroad across said township fifteen as aforesaid, and denies all knowledge or information sufficient to form a belief as to whether on said 6th day of October, 1897, a deed of the lands described in said maps and profiles was 47 placed in escrow to be delivered when the injunction should be dissolved.

Seventh. Denies that on the 6th day of October, 1897, the State engineer and surveyor and the members of the forest preserve board signed a paper, a copy of which is annexed to said complaint and marked "B," and denies that any paper signed by the forest preserve board, of which a copy is annexed to said complaint and marked "B," was filed in the office of the secretary of state on said 6th day of October, 1897, or that a notice of said filing and the date of the filing of the description contained in said paper "B," which notice contained the same description of the real property which is con-

tained in paper "B," was served upon the Indian River Company on the 6th day of October, 1897.

Eighth. Admits, upon information and belief, that on the eleventh day of November, 1897, the forest preserve board and the comptroller, paid to the Indian River Company the sum of \$99,000, and denies all knowledge or information sufficient to form a belief as to whether said money was the full sum of the purchase-money under any contract, and denies all knowledge or information sufficient to form a belief as to whether the plaintiffs, through their said State engineer or surveyor and forest force, entered into possession of said lands.

Ninth. Admits that the Adirondack Railway Company, prior to the eleventh of November, 1897, to wit, on the 7th day of October, 1897, proceeded against the other defendants herein to condemn the land described in said maps and profiles so filed as aforesaid, and admits that on the thirtieth day of November, 1897, those proceedings stood to be heard on the 21st day of December, 1897; and this defendant denies that said proceedings were begun only on said 7th day of October, 1897, or that at the time of the verification of the complaint herein, they stood to be heard on the 21st day of December, 1897.

48 Tenth. Denies all knowledge or information sufficient to form a belief as to any "arrangement spoken of in paper 'C'" annexed to said complaint, and admits that the appeal referred to in papers "A" annexed to said complaint was taken, noticed to be heard by the appellate division of the court for the 2nd of December, 1897, and was the first case on the calendar for that day.

Eleventh. Admits upon information and belief that on the thirtieth day of November, 1897, the defendant Ashley signed and sent to the Honorable J. P. Allds, papers, of which copies are annexed to said complaint marked "C" and on the first of December, 1897, he, being the attorney of record for The Indian River Company and others of the defendants in said action, stipulated the appeal over the term; and this defendant denies that the papers annexed to said complaint and marked "C" are all the papers that were sent by said defendant Ashley to the Honorable J. P. Allds in connection with the matter therein referred to, and begs leave to refer to the other papers exchanged between said parties, whereof said papers annexed to the complaint and marked "C" are but a part, as the same may be produced upon the trial hereof.

Twelfth. Admits that on the 14th day of January, 1898, the said appeal was heard by the appellate division, and that the case was decided by said appellate division on the second day of March, 1898. It avers that on said day an opinion was handed down by said appellate division to the effect that the order continuing the injunction should be reversed and the injunction should be dissolved, but it avers upon information and belief that no order of the court reversing said order and dissolving said injunction has ever yet been made or entered; and it denies all knowledge or information sufficient to form a belief as to whether upon the handing down of said

49 opinion of the appellate division or otherwise, any deed theretofore placed in escrow was delivered to the people of the State of New York or has since been recorded.

Thirteenth. Admits that the defendant The Adirondack Railway Company was at the time of the verification of the complaint herein proceeding with its condemnation proceedings against the other defendants, and had obtained in each proceeding a judgment against said defendants, which among other things provided for the appointment of commissioners.

Fourteenth. Denies that the other defendants had made substantially no defense in said proceedings, and denies upon information and belief that the other defendants had not informed the forest preserve board or any member of the State government of the fact that such proceedings were continuing; and it admits that the defendant, The Adirondack Railway Company, intended to continue said proceedings with a view of acquiring title thereby to that portion of township fifteen described in said maps and profiles so filed as aforesaid.

And further answering, and for a second and separate defense to the alleged cause of action set forth in the complaint herein, this defendant further shows:

Fifteenth. That the defendant The Adirondack Railway Company, with the intent of exercising its vested right to acquire by eminent domain a right of way for its line across township fifteen of Totten and Crossfield's purchase, did on the 18th day of September, 1897, cause to be filed in the respective offices of the clerks of the counties of Warren, Hamilton and Essex a map and profile of the route adopted by it across said township in each of said counties, and on and prior to September 23d, 1897, had caused to be served a notice of the filing of said maps and profiles on each of the other defendants herein excepting the defendant Jeremiah W. Finch, who was served on October 1st, 1897, all of said other defendants being or claiming to be the owners of said lands, which were wild 50 forest lands and without actual occupants within the meaning of the statute.

That by the provisions of the statute authorizing the defendant The Adirondack Railway Company to exercise its said right of eminent domain, said defendant was prevented from doing anything further in the exercise of such vested right until after the expiration of fifteen days from and after the giving of written notice to all actual occupants of said lands of the time and place at which said maps and profiles were filed.

Sixteenth. That no notice having been given to the defendant The Adirondack Railway Company of any application for the appointment of commissioners to examine said route, and no such application having in fact been made, said defendant company did on the 7th day of October, 1897, continue the statutory proceedings theretofore commenced by it to acquire by eminent domain its right of way across said township fifteen, by serving upon one or more of the owners of said lands a petition for the condemnation thereof together with a notice of the time and place of presentation of said

petition, and subsequently to said service, but on the same day, filing and recording in the offices of the clerks of Warren, Hamilton and Essex counties, respectively, a notice of the pendency of said proceedings, stating the names of the parties and the object of said proceedings and containing a description of the property affected thereby, which said notices were forthwith indexed against the name of each of the defendants in said proceedings, including the Indian River Company; and that said notice of the pendency of said proceedings was filed and recorded in the office of the clerk of Warren county and indexed against all of said defendants, including said Indian River Company, prior to the serving upon the Indian River Company or upon any other of the owners of said real property of any notice of the filing or of the date of filing of the description of the lands sought to be appropriated by the plaintiffs as alleged in the complaint herein.

51 **Seventeenth.** That no notice of the filing and of the date of filing of the description of said real property so sought to be appropriated has ever been served upon the defendant, The Adirondack Railway Company.

Eighteenth. That such proceedings were had in said statutory proceedings so commenced by the defendant Adirondack Railway Company in each of said counties of Warren, Hamilton and Essex, as aforesaid, to acquire by the exercise of its right of eminent domain a right of way for its railroad across said township fifteen, that at a special term of the supreme court in and for the fourth judicial district, held at the county court-house in the village of Plattsburgh on the 12th day of March, 1898, it was in each of said proceedings on the appearance of the Adirondack Railway Company and of all of the defendants to said proceedings, and upon proof duly made, among other things, adjudged and decreed that said Adirondack Railway Company was entitled to the relief demanded in its said petition and that the condemnation of the real property described in said petition was necessary for the public use and that said Adirondack Railway Company was entitled to take and hold said property for the public use specified in its said petition, to wit, the construction, operation and maintenance of its line of railway across said township fifteen, upon making compensation therefor; and in and by said judgment, commissioners were duly appointed by the court to ascertain the compensation to be made to the owners of said property so taken for said public use.

Nineteenth. Upon information and belief, that the plaintiffs herein, represented by said forest preserve board, had full notice of said proceedings from the commencement to the end thereof and were given by the respective attorneys for the defendants therein, the full and entire control of the defense of said proceedings, and that said plaintiffs, through J. P. Allds, the attorney for said forest preserve board, did participate in and did control the 52 conduct of such defense on their own behalf and for their own benefit, although in the names of the Indian River Company and of the other defendants of record therein who at the time of the commencement of said proceedings and prior to the

delivery by them to said plaintiffs of any deed thereto, had been and were the owners of said land; and that said plaintiffs having had their day in court in said proceedings and having had full opportunity to participate in and to control the defense thereof and having actually taken part in and controlled said defense, are concluded by the judgments so rendered as aforesaid in each of said proceedings.

And further answering and for a third and separate defense to the alleged cause of action set forth in the complaint herein, this defendant further shows:

Twentieth. That the title to the lands in township fifteen described in the maps and profiles so filed as aforesaid in the offices of the clerks of Warren, Hamilton and Essex counties, respectively, is claimed by the plaintiffs herein to have been acquired under and by virtue of the proceedings taken by the forest preserve board pursuant to authority claimed and pretended to have been conferred upon it so to acquire said lands by sections two, three, and four of chapter two hundred and twenty of the Laws of 1897 of the State of New York.

Twenty-first. Upon information and belief, that said sections, and particularly section four of said chapter 220 of said Laws of 1897, and the enactment thereof, were and are in direct violation of section one of article one of the constitution of the State of New York, which provides that no member of this State shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers; and are also in direct violation of section six of article one of the constitution of the State of New York, which provides that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation, and that said sections and their enactment at no time conferred any legal authority upon the plaintiffs or upon their representatives to enter upon or take possession of the lands hereinbefore referred to, and that the plaintiffs herein never acquired and have not now any title to or property whatever in said lands.

53 And further answering for a fourth and separate defense to the alleged cause of action set forth in the complaint herein, this defendant reiterating each and every allegation contained in the paragraph of this answer marked "Twentieth," as if the same were herein again set forth at length, further shows:

Twenty-second. Upon information and belief that said sections and particularly sections three and four of said chapter 220 of said Laws of 1897, and the enactment thereof, were and are in direct violation of section seventeen of article three of the constitution of the State of New York, which provides that no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act, and that said sections and their enactment at no time conferred any legal authority upon the plaintiffs

or upon their representatives to enter upon or take possession of the lands hereinbefore referred to, and that the plaintiffs herein never acquired and have not now any title to or property whatever in said lands.

And further answering and for a fifth and separate defense to the alleged cause of action set forth in the complaint herein, this defendant reiterating each and every allegation contained in the paragraph of the answer marked "Twentieth," as if the same were here again set forth at length, further shows:

Twenty-third. Upon information and belief, that said sections and particularly section four of said chapter 220 of said Laws 54 of 1897, and the enactment thereof were and are in direct violation of section one of the fourteenth amendment to the Constitution of the United States of America which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of life, liberty or property without due process of law, and shall not deny to any person within its jurisdiction the equal protection of the laws, and that said sections and their enactment at no time conferred any legal authority upon the plaintiffs or upon their representatives to enter upon or take possession of the lands hereinbefore referred to, and that the plaintiffs herein never acquired and have not now any title to or property whatever in said lands.

And further answering and for a sixth and separate defense to the alleged cause of action set forth in the complaint herein, this defendant reiterating each and every allegation contained in the paragraph of this answer marked "Twentieth," as if the same were here again set forth at length, further shows:

Twenty-fourth. Upon information and belief that said sections, and particularly section four of said chapter 220 of said Laws of 1897, and the enactment thereof, were and are in direct violation of section ten of article 1, of the Constitution of the United States of America, which provides that no State shall pass any law impairing the obligation of contracts, and that said sections and their enactment at no time conferred any legal authority upon the plaintiffs or upon their representatives to enter upon or take possession of the lands hereinbefore referred to, and that the plaintiffs herein never acquired and have not now any title to or property whatever in said lands.

Wherefore this defendant prays judgment that the complaint be dismissed with costs.

LEWIS E. CARR,
Attorney for Defendant, Adirondack Railway Company,
56 North Pearl Street, Albany, N. Y.

55 CITY AND COUNTY OF NEW YORK, ss:

Chas. A. Walker, being duly sworn, says:

I am secretary and treasurer of the Adirondack Railway Company, the defendant above named.

I have read the foregoing answer, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is made by me and not made by said defendant is that said defendant is a corporation.

The sources of my information and the ground of my belief as to all matters not stated to be alleged upon my own knowledge are information afforded me by the counsel for said company.

CHAS. A. WALKER

Sworn to before me this 3d day of June, 1898.

FRANK WALLING,
Notary Public, N. Y. Co.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK }
 against } Decision.
THE ADIRONDACK RAILWAY COMPANY and Others.

56 I, Alden Chester, having heard the proofs and allegations
of the parties upon the issues raised by the answer of the
Adirondack Railway Company to the complaint, which issues
were tried without a jury at a special term held by me in the county
of Albany, do,

Decide that the People of the State of New York are entitled to the relief demanded in the complaint.

The grounds of this decision are that the People of the State of New York having become the owners in fee of the township fifteen described in the complaint, which township is within the bounds of the forest preserve and of the Adirondack park, the Adirondack Railway Company has acquired no rights which it can assert against the State.

And I direct judgment that it be perpetually enjoined from prosecuting either of the proceedings described in the complaint and any proceeding to take any part of, or any interest in, the said township fifteen, and from permitting any such proceeding to proceed in its name or behalf, and for costs.

Twenty-ninth of October, 1898.

ALDEN CHESTER,
Justice Supreme Court.

57 At a special term of the supreme court, held at the city hall in the city of Albany, N. Y., on the 5th day of November, 1898.

Present: Hon. Alden Chester, justice.

THE PEOPLE OF THE STATE OF NEW YORK, }

Plaintiffs,
against

ADIRONDACK RAILWAY COMPANY, INDIAN
River Company, William McEchron, } Judgment. Nov. 7th,
Phoebe A. Hitchcock, Jeremiah W. } 1898, 1 p. m.
Finch, Daniel J. Finch, Eugene L. Ashley,
and John McGinn, Defendants.

The issues in the above-entitled action made by the answer of the defendant Adirondack Railway Company to the complaint, having been tried by the court without a jury, and the court having made and filed its written decision whereby it directs judgment in favor of the plaintiffs for the relief demanded in the complaint, and it appearing to the court that the summons and complaint have been served upon all the defendants more than 20 days since, and that no answer or demurrer has been received from either of the defendants, except the Adirondack Railway Company, and that none of the defendants, except Adirondack Railway Company has appeared in the action, it is now, on motion of the attorney general—

Adjudged, that township fifteen, of Totten and Crossfield purchase, situated in Hamilton, Warren and Essex counties, and 58 described in the complaint herein is the property of the People of the State of New York, and is situated within the Adirondack park and the forest preserve.

And it is further adjudged that the defendants, and each of them, their agents and servants, be and they are perpetually enjoined from further continuing any of the condemnation proceedings described in the complaint herein, and from beginning or continuing any condemnation proceedings to take any part of, or interest in any part of, said township fifteen, and from suffering any such proceedings to be begun, proceeded with or continued in their or either of their names or behalf, and that the people of the State of New York recover of the defendant Adirondack Railway Company one hundred and fifty dollars costs herein.

Enter.

ALDEN CHESTER,
Justice Supreme Court.

JAMES M. BORTHWICK, *Clerk.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE ADIRONDACK RAILWAY COMPANY and
Others. } Opinion at Special
Term.

CHESTER, J.:

The State by this action seeks to enjoin the defendant, The Adirondack Railway Company, from taking or continuing condemnation proceedings to procure a right of way for a railroad across what is known as township 15, which lies in the counties of Warren, Essex and Hamilton and which is wholly within the Adirondack park and is a part of the forest preserve.

While the State was conducting negotiations for the purchase of township 15 this railway company procured from the special term an injunction restraining the owners of the township from conveying it to the State, except subject to the right of way claimed by the company. This claim was based upon the filing by the company on September 18, 1897, of a map and profile of its proposed right of way over such township in the clerk's offices in the counties of Warren, Essex and Hamilton, under section 6 of the railroad law and the service of notices upon the property-owners. From an order continuing that injunction during pendency of the action, an appeal was taken to the appellate division in the third department where the order was reversed and the injunction vacated.

Adirondack Railway Co. v. Indian River Co. (27 App. Div., 326).

It is urged by the plaintiff here that the appellate division decided in that case that the railway company had no rights under the privilege granted to it to condemn land for railroad purposes, and had acquired none that it could assert against the State, and that any rights or privileges the railway company had under the power of eminent domain were taken subject and subordinate to the right of the State to exercise that power in its own immediate behalf. (*Id.*, page 335.)

The defendant insists, however, that three of the justices did not concur in this conclusion, and therefore that it is not controlling upon the trial before me.

Two propositions are discussed in the opinion, which was written by Mr. Justice Herrick: first, the one above stated, and second, that if the railway company was right in its contention that it had acquired a right of way over this township it did not need any injunction, for any conveyance to the State would have to be subject to that right.

In the concluding sentence of the opinion the learned justice says: "I am of the opinion, therefore, that, because in one aspect of the case an injunction is not needed to protect the plaintiff's claim of right, and in another aspect of the case it is a practical interference with, restraint upon, and obstruction to, the exercise by the State of its power of eminent domain, the injunction should be vacated and

set aside." It will be observed that in this concluding sentence the two propositions are mentioned in the reverse order of their discussion in the opinion.

The concurrence of the other justices is in this language: "All concurred; Parker, P. J., Landon and Merwin, J. J., upon grounds last stated in opinion."

From this statement of grounds of concurrence the conflict before me as to what was decided has arisen, the plaintiff claiming that it was the proposition first discussed in the opinion and mentioned last in the concluding sentence, and the defendant that it was directly the converse.

It is my belief that the concurrence was upon the ground that the injunction was not needed to protect the plaintiff's claim of right instead of on the ground last mentioned in the concluding sentence, yet there was no recorded dissent from the opinion of Justice Herrick and his reasoning, in discussing the first proposition, is so clear and convincing that I am led to agree with the conclusion he arrived at with respect to that question, regardless of whether or not it was concurred in by two other justices, and to hold here that the defendant company has acquired no rights under the condemnation law which it can assert as against the State.

The facts upon which the opinion written at the appellate division is founded are fully stated in the report of that case and need 61 not be repeated here, nor need I attempt to add anything to the reasoning leading to the conclusion above expressed.

See *Adirondack Railway Co. v. Ind. River Co., supra.*

The facts arising since the granting of the injunction which was vacated do not in my opinion furnish any material aid in support of the contention of the railway company. The owners were about to convey township 15 to the State when, on October 1, 1897, they were prevented from so doing by the injunction. They thereupon put the deed of the township in escrow to be delivered when the injunction was dissolved, and made and delivered another deed excepting the strip of land described in the railway survey. The deed in escrow was delivered March 2, 1898, after the dissolution of the injunction. On the 7th day of October, 1897, the State caused a notice, under section 4, of chapter 220, Laws 1897, to be served upon the owners of the strip of land described in the railroad map, and from that time it is insisted by the plaintiff that such land became the property of the State by appropriation in the exercise of its right of eminent domain under that law. On the same day the railway company began condemnation proceedings under the railroad law to take the strip of land in question. In the proceedings commenced by the railway company, in a single day (March 12, 1898) an order of reference to hear and determine was made, a trial before the referee had, a decision made and a judgment procured that the railway company is entitled to take the strip of land for its use upon making compensation therefor, and appointing three commissioners to ascertain the compensation to be made to the owners. The State was not a party to these proceedings.

Each side claims precedence over the other in commencing their respective condemnation proceedings, and the railway company attacks the constitutionality of the provisions of chap. 220, Laws 1897, so far as that act permits the condemnation of lands 62 for public use by the method pursued by the State in this case. From the view I take of the case as above expressed, it is unnecessary for me to determine these questions.

Under the condemnation proceedings taken by the railway company, the title of the lands sought to be taken does not pass upon the procuring of a judgment of condemnation, nor does it pass until the amount of compensation has been determined and actually paid to the owners.

Code Civil Procedure, §§ 3371 and 3373.

The compensation not having been determined and paid, the title or right of the railway company, if any, is the same now as when the appellate division vacated the injunction.

In the meantime the State has procured the legal title by the delivery of the deeds herein mentioned, regardless of the question whether or not the alleged condemnation by the State was effective to appropriate the land as the property of the State under the law, the constitutionality of which is here questioned.

I am aware that in the opinion written by Justice Herrick in the case at the appellate division, mention is made of the relative rights of the parties with reference to taking the property under the power of eminent domain, the one under the condemnation law and the other under the forest preserve act (ch. 220, Laws 1897), and that the question of the constitutionality of the exercise by the State of the power to appropriate land by the method provided in the latter act is not passed upon in that opinion. That act, however, provides not only for a method of appropriation by the State, but authorizes the forest preserve board to acquire land for the State by "purchase or otherwise" (§ 2).

In this case the State has not only acquired the land by agreement with and deed from the owners, but has pursued the method provided by the statute for a condemnation or appropriation of it,

and I think the conclusion reached in the opinion referred to 63 as — the superior right of the State is equally well founded, regardless of by which of these two methods the State procured title. If I am right in this, a determination of the constitutionality of the act authorizing the State to pursue the method of condemnation it did is not essential to a decision of the case for the State may rely alone upon its title by deed.

The State having acquired the lands, they are now part of the forest preserve, and are brought within the protection of section seven of article seven of the constitution, which provides that: "The lands of the State, now owned or hereafter acquired, constituting the forest preserve, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, nor shall the timber thereon be sold, removed or destroyed."

These lands are not therefore subject to be taken by this railway

company, and the plaintiff is entitled to the relief demanded in the complaint, with costs.

Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK }
against } Notice of Exceptions.
 THE ADIRONDACK RAILWAY COMPANY and }
 Others.

The defendant, The Adirondack Railway Company, hereby excepts to the decision of Mr. Justice Chester, dated October 29th, 1898, and filed in the office of the clerk of the county of Albany, on November 3, 1898, as follows:

It excepts to the decision of the said justice that the People of the State of New York are entitled to the relief demanded in the complaint.

64 It excepts to the decision of said justice in so far as he decides as a matter of law that the People of the State of New York have become the owners in fee of the township fifteen described in the complaint, and that the Adirondack Railway Company has acquired no rights which it can assert against the State.

It excepts to the decision of said justice in so far as he decides that the plaintiff is entitled to judgment perpetually enjoining the Adirondack Railway Company from prosecuting either of the proceedings described in the complaint and any proceedings to take any part of or any interest of the said township fifteen, and from permitting any such proceeding to proceed in its name or behalf, and for costs.

Dated Albany, New York, November 5th, 1898.

LEWIS E. CARR,
Attorney for Defendant Adirondack Railway Company,
56 North Pearl Street, Albany, N. Y.

To Hon. T. E. Hancock, attorney general; James M. Borthwick, Esq., clerk, &c.

65 Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK }
against } Notice of Appeal to
 THE ADIRONDACK RAILWAY COMPANY and } Appellate Division.
 Others.

SIRS: You will please take notice that the defendant, The Adirondack Railway Company, hereby appeals to the appellate division of the supreme court in and for the third judicial department from

(Sgd) L. E. C., T. E. H.,
by E. W. P.
judgment.

the judgment entered herein in favor of plaintiff and against defendant on the 7th day of November, 1898, and from each and every part of said

Dated Albany, New York, November 7th, 1898.

Yours, &c.,
LEWIS E. CARR,
Attorney for Defendant Adirondack Railway Company,
56 North Pearl Street, Albany, N. Y.

To Hon. T. E. Hancock, attorney general; James M. Borthwick, Esq., clerk, etc.

66 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK }
against

ADIRONDACK RAILWAY COMPANY, INDIAN }
River Company, William McEchron,
Phoebe A. Hitcheock, Jeremiah W. Finch,
Daniel J. Finch, Eugene L. Ashley, and
John McGinn.

} Case Containing Ex-
ceptions.

This action came on for trial before Honorable Alden Chester, one of the justices of this court, at a special term, held in the city of Albany, on the 12th day of July, 1898.

Edward Winslow Paige, Esq., and G. V. D. Hasbrouck, Esq., appeared for plaintiffs.

Lewis E. Carr, Esq., and R. Burnham Moffat, Esq., appeared for defendant Adirondack Railway Company.

None of the other defendants appeared.

Mr. Paige having opened the case for plaintiffs thereupon called—

JOTHAM P. ALLDS, who, being duly sworn as a witness for the plaintiffs, testified as follows:

Direct examination by Mr. PAIGE:

I reside at Norwich, New York, and am an attorney and counsellor-at-law. In the year 1897 I was from time to time counsel for the forest preserve board.

Plaintiffs' counsel offers in evidence the following papers:

67 Deed dated August 13th, 1897, from William McEchron and Sarah E., his wife, William E. Spier and Ida M., his wife, George F. Underwood and Jennie A., his wife, parties of the first part, to the Indian River Company, a domestic corporation organized under the laws of the State of New York, party of the second part. Consideration, \$78,000. Conveys certain property in township 32 with stated exceptions. Covenant against grantor's acts. Acknowledged in Warren county September 2nd, 1897, and

recorded in the office of the clerk of Hamilton county on October 8th, 1897, at one o'clock p. m., in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 1.

Deed dated September 2nd, 1897, between the Glens Falls Paper Mill Company, a corporation organized under the laws of the State of New York, party of the first part, and the said Indian River Company, party of the second part. Consideration, \$60,000. Conveys 24,000 acres, more or less, lying in township 15, Totten and Crossfield's purchase, and situated in Warren, Hamilton and Essex counties, being an undivided one-half part of said township. This deed conveys the same premises described in three certain deeds to the party of the first part, namely, one dated August 7th, 1897, from Eugene L. Ashley and wife conveying an undivided one-fourth of said township; one from Daniel J. Finch and wife, dated August 30th, 1897, conveying an undivided one-eighth of said township; and one from Phœbe A. Hitchcock, dated August 30th, 1897, conveying an undivided one-eighth of said township. Acknowledged in Warren county on September 2nd, 1897, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon in Liber 114 of Deeds, and recorded in the office of the clerk of Hamilton county on the 8th of October, 1897, at one o'clock in the forenoon, in Liber 30 of Deeds.

Same received and marked Plaintiff's Exhibit 2.

68 Deed dated September 2nd, 1897, from Phœbe A. Hitchcock, party of the first part, to said The Glens Falls Paper Mill Company, party of the second part. Consideration \$7,500. Conveys all the right, title and interest of the party of the first part in and to a tract of 4,000 acres, situated in township 15, Totten and Crossfield's purchase, and lying in Warren, Hamilton and Essex counties; deed intending to convey an undivided one-eighth part of said township. Acknowledged September 2nd, 1897, in Warren county, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon in Liber 114 of Deeds; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the forenoon in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 3.

Deed dated September 2nd, 1897, between Jeremiah W. Finch and Augusta his wife, parties of the first part, and said The Indian River Company, party of the second part. Consideration \$30,000. Conveys all the right, title and interest of the parties of the first part in and to 24,000 acres of land lying in township 15, Totten and Crossfield's purchase, and situated in the counties of Warren, Hamilton and Essex, the deed intending to convey an undivided one-fourth part of said township. Acknowledged in Warren county September 2nd, 1897, and recorded in the office of the clerk of Essex county on October 8th, 1897, at nine o'clock in the forenoon in Liber 114 of Deeds; and recorded in the office of the clerk of

Hamilton county on October 8th, 1897, at one o'clock in the forenoon in Liber 30 of Deeds.

Same received and marked Plaintiff's Exhibit 4.

69 Deed dated September 2nd, 1897, between John McGinn and Margaret his wife, parties of the first part, and said The Indian River Company, party of the second part. Consideration \$30,000. Conveys all the right, title and interest of the parties of the first part in and to 24,000 acres of land lying in township 15, Totten and Crossfield's purchase, and situated in the counties of Warren, Hamilton and Essex, the deed intending to convey an undivided one-fourth part of said township 15. Acknowledged in Hamilton county, September 2nd, 1897, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon in Liber 114 of Deeds; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 5.

Deed dated September 2nd, 1897, between Eugene L. Ashley and Elizabeth H. his wife, parties of the first part, and said The Glens Falls Paper Mill Company, party of the second part. Consideration \$15,000. Conveys all the right, title and interest of the parties of the first part in and to 24,000 acres of land lying in township 15, Totten and Crossfield's purchase, and situated in the counties of Warren, Hamilton and Essex, said deed intending to convey an undivided one-fourth part of said township 15. Acknowledged in Warren county September 1st, 1897, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon, in Liber 114 of Deeds; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 6.

70 Satisfaction of mortgage dated September 2nd, 1897, signed by Jeremiah W. Finch and certifying that an indenture of mortgage bearing date November 1st, 1881, made and executed by John J. Finch and Clara B., his wife, to H. Crandall, and recorded in the office of the clerk of Hamilton county in Book No. 7 of Mortgages at page 129 on February 6th, 1882, is, with the bond accompanying it, fully paid and satisfied. Acknowledged in Warren county September 2nd, 1897, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon in Liber 9 of Assignments and Satisfaction of Mortgages; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon in Liber 13 of Mortgages.

Same received in evidence and marked Plaintiff's Exhibit 7.

Satisfaction of mortgage dated September 3rd, 1897, signed by Clayton W. Finch and Catharine A. Cool, certifying that a certain

indenture of mortgage bearing date May 1st, 1896, made and executed by Eugene L. Ashley to Clayton W. Finch and Catharine A. Cool and recorded in the office of the clerk of Warren county in Book 44 of Mortgages, page 382 on May 23rd, 1896; and recorded in the office of the clerk of Essex county in Book 54 of Mortgages at page 455 on March 27th, 1897; and recorded in the office of the clerk of Hamilton county in Book 12 of Mortgages at page 374 on June 9th, 1897, is, with the bond accompanying the same, fully paid and satisfied. Acknowledged in New York county September 3rd, 1897, and in Saratoga county September 8th, 1897, and recorded in the office of the clerk of Essex county on October 8th, 1897, at nine o'clock in the forenoon in Liber 9 of Assignments and Satisfactions; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon in Liber 13 of Mortgages.

Same received in evidence and marked Plaintiff's Exhibit 8.

71 Satisfaction of mortgage dated September 2nd, 1897, and signed Finch & Co. by J. W. Finch, certifying that a certain indenture of mortgage bearing date April 1st, 1877, made and executed by John McGinn and wife to Henry Crandall, and recorded in the office of the clerk of Warren county in Book 10 of Mortgages at page 308 on August 8th, 1877, at nine o'clock in the forenoon, and in the office of the clerk of Hamilton county on September 11th, 1877, at six o'clock in the afternoon in Liber 6 of Mortgages at page 204; and recorded in the office of the clerk of Essex county on August 29th, 1877, at nine o'clock in the forenoon in Book 40 of Mortgages at page 311, which said mortgage was assigned by Henry Crandall to Finch & Co. by assignment dated August 1st, 1877, and recorded in Warren county clerk's office August 8th, 1877, in Book 10 of Mortgages at page 309, and recorded in Essex county clerk's office August 29th, 1877, in Book 1 of Satisfaction of Mortgages at page 533, and recorded in Hamilton county clerk's office September 11, 1877, in Book 6 of Mortgages at page 307, is, together with the bond accompanying the same, fully paid and satisfied. Acknowledged in Warren county September 2nd, 1897, and recorded in the office of the clerk of Essex county October 8th, 1897, at nine o'clock in the forenoon, in Liber 19 of Satisfactions, and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon, in Liber 13 of Mortgages.

Same received in evidence and marked Plaintiff's Exhibit 9.

Deed dated September 24, 1897, between Daniel J. Finch and Isabella, his wife, parties of the first part, and said The Glens Falls Paper Mill Company, party of the second part. Consideration \$7,500. Conveys all the right, title and interest of the parties of the first part in and to 24,000 acres of land lying in township 72 15, Totten and Crossfield's purchase, and situate in the counties of Warren, Hamilton and Essex, this deed intending to convey an undivided one-eighth part of said township 15.

Acknowledged in Warren county September 2d, 1897, and recorded in the office of the clerk of Essex county October 8th, 1897, at nine o'clock in the forenoon, in Liber 114 of Deeds, and recorded in the office of the clerk of Hamilton county on October 8th, 1897, at one o'clock in the afternoon, in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 10.

Examination of witness continued:

Q. I show you Plaintiff's Exhibits 1 to 10 inclusive. Do you recognize these deeds?

A. I do. They were delivered to me the day of the meeting in September there.

MR. CARR: I object to the witness using the word "delivered" except as it may mean a personal delivery to him.

(Witness continuing:)

Mr. Ashley gave them to me on that day and they were placed in a box labeled "township 15," and were there until the 7th day of October. They were given to me by Mr. Ashley on the 14th day of September, 1897.

Q. What was done with them then?

A. They were forwarded to the proper county clerk's offices for record.

Plaintiff's counsel offers in evidence certified copy of resolution of forest preserve board to condemn property.

Same received in evidence and marked Plaintiff's Exhibit 11, as follows:

OFFICE OF STATE ENGINEER AND SURVEYOR,
ALBANY, N. Y.

To the honorable forest preserve board:

73 In pursuance of your direction I transmit herewith the annexed description of the land embraced in your request of October 6th, 1897.

Respectfully yours,

C. W. ADAMS,
State Engineer and Surveyor.

Description.

Description of land in township 15, Totten and Crossfield's purchase, Hamilton, Essex, and Warren counties, New York, in the territory embraced in the Adirondack park which it is proposed shall be appropriated by the State of New York under and pursuant to an act of the legislature of the — New York, known as chap. 220 of the Laws of 1897.

All that certain tract or parcel of land situate lying and being in the counties of Hamilton, Essex and Warren and State of New York, and being a portion of township 15 Totten and Crossfield's purchase, and being a strip of land six (6) rods in width and being three (3)

rods in width upon each side of a centre line of a proposed route of the Adirondack Railway Company across said township as is shown upon three certain maps filed respectively in Hamilton, Essex and Warren counties, to which maps reference is hereby made for a more particular description.

The maps to which reference is hereby made being a map filed in the respective county clerk offices on September 18th, 1897, and which bears the endorsement "Adirondack Railway Company." Map showing proposed location through Hamilton county, N. Y., Warren county, Essex county, respectively, and each of which is certified by R. S. Grant, president, and P. H. Brown, chief engineer.

Said centre line commencing upon the south line of township 15 at the southwest corner of lot 149 and crossing lots 149, 140, 141, 134, 117, 116, 101, 100, 99, 98, 95, 74, 73, 72, 49, 50, 51, 46, 45, 28, 29, 30, 43, 42, 31, 18 and 17 and strikes the north line of township 15 near the centre of the north line of the northeast quarter of said lot 7; and being the said land excepted and reserved in a certain deed dated the second day of September, 1897, and acknowledged

the seventh day of October, 1897, made and executed by the
74 Indian River Company to the People of the State of New

York, the said lands so excepted and reserved being in the said deed described in words and figures following, to wit: "So much of that tract of land situated in Warren, Essex and Hamilton counties and known as part of township 15 of Totten and Crossfield purchase as is comprised within the route adopted by the Adirondack Railway Company over said township as shown by the map filed by the said Adirondack Railway Company in said counties."

STATE OF NEW YORK, }
County of Albany, City of Albany, }
ss:

I, Campbell W. Adams, State engineer and surveyor, of the State of New York, do hereby certify that the foregoing description of lands in township 15, Totten and Crossfield's purchase in Hamilton, Essex and Warren counties, State of New York, is an accurate description of the lands reserved in a certain deed from the Indian River Company to the State of New York which are to be appropriated by the State of New York acting by and under the authority of the forest preserve board pursuant to an act of the legislature of the State of New York, passed April 8th, 1897, entitled "An act to provide for the acquisition of lands in the territory embraced in the Adirondack park and making an appropriation therefor," and that the same is correct.

Dated October 7th, 1897.

CAMPBELL W. ADAMS,
State Engineer and Surveyor.

STATE OF NEW YORK, }
County of Albany, City of Albany, }
ss:

We, Timothy L. Woodruff, Charles H. Babcock and Campbell W. Adams, being the forest preserve board, acting under and in pur-

suance to an act of the legislature of the State of New York, being chap. 220 of the Laws of 1897, entitled "An act to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor," do hereby certify that the lands in township 15, Totten and Crossfield's purchase in the counties of Hamilton, Essex and Warren, State of New York, described in the foregoing certificate of the State engineer, have been and hereby are duly appropriated by the State of New York for the purpose of making them a part of the Adirondack park.

Dated Albany, October 7th, 1897.

TIMOTHY L. WOODRUFF,
CHARLES H. BABCOCK,
CAMPBELL W. ADAMS,
Forest Preserve Board.

Endorsed: State engineer certificate & description & forest preserve board's certificate of condemnation. State of New York, office of secretary of state. Filed Oct. 7, 1897, a. m. Andrew Davidson, deputy secretary of state.

STATE OF NEW YORK, }
Office of the Secretary of State, }^{ss}:

I have compared the preceding copy of certificate of description and certificate of condemnation with the original thereof remaining on file in this office and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary [SEAL.] of state, at the city of Albany, this twenty-second day of November, one thousand eight hundred and ninety-seven.

HORACE G. TENNANT,
Second Deputy Secretary of State.

76 Plaintiff's counsel offers in evidence notice of condemnation of property.

Same received in evidence and marked Plaintiff's Exhibit 12, as follows:

To the Indian River Company and to William McEchron as president thereof:

Take notice that on the 7th day of October 1897 there was filed in the office of the secretary of state of the State of New York at Albany, N. Y., a description of said lands belonging to you in township fifteen (15) Totten and Crossfield's purchase, Hamilton county, New York, which have been appropriated by the State of New York pursuant to an act of the legislature of the State of New York entitled "An act to provide for the acquisition of lands in the territory embraced in the Adirondack park, and making an appropriation therefor" passed April 8th 1897.

A general description of the real property which has been so appropriated is as follows: A strip of land six rods in width extending

from the south line of township fifteen commencing at the southwest corner of lot 149 and running from thence across said township to the north line near the northeast corner as laid down on three certain maps filed in Hamilton, Warren and Essex county clerks' offices, showing the proposed route across said township of the Adirondack Railway Company and being the same land reserved by you in your deed to the State.

On said description so filed in the office of the secretary of state on October 7th, 1897, there was endorsed a certificate of the said The Forest Preserve Board stating that the said lands had been appropriated by the State of New York.

Dated Albany, October 7th, 1897.

CHARLES H. BABCOCK,
CAMPBELL W. ADAMS,
The Forest Preserve Board.

(Acknowledged in Albany county, October 7th, 1897. County clerk's certificate as to notary's signature dated October 7th, 1897.)

(Here follows a copy of the resolution of the forest preserve board, of which Exhibit 11 is a copy.)

77 STATE OF NEW YORK, }
 County of Albany, City of Albany, }
 ^{ss}:

I, John A. Cole, being duly sworn, depose and say that I am over twenty-one years of age; and on the 7th day of October, 1897, at the city of Albany, I served on William McEchron, the president of the Indian River Company, a notice of which the foregoing papers is a copy by delivering to and leaving the same with said William McEchron personally.

JOHN A. COLE.

Sworn to before me this 7th day of October, 1897, as interlined.

J. J. FOURQUREAN,
Notary Public.

(County clerk's certificate as to notarial signature dated October 7th, 1897.)

The foregoing notice was recorded in the office of the clerk of Hamilton county on October 8th, 1897, at one o'clock in the afternoon in Book 30 of Deeds, at page 545.

Examination of witness continued:

Plaintiff's Exhibit 11 is a certificate of the forest preserve board for condemning property. Yes, I have seen the original of that paper. I filed the original in the office of the secretary of state.

Q. When?

A. The date that it bears endorsed there.

Q. The hour and minute?

A. About between ten and five minutes to twelve o'clock that morning.

Q. On the 7th day of October, 1897?

A. Yes, sir.

Yes, the paper marked Plaintiff's Exhibit 12 is the same paper with the record of the county clerk's office.

My attention is called to the affidavit of John A. Cole, purporting to be an affidavit of service of the paper on the president of the Indian River Company. Yes, that service was made in my presence. It was made in the rooms of the forest preserve board some time between ten and five minutes of twelve.

78 Plaintiff's counsel offers in evidence deed dated September 2d, 1897, between said The Indian River Company, party of the first part, and the People of the State of New York, party of the second part. Consideration \$164,000, the receipt of which is confessed and acknowledged. Conveys all that tract of land situate in the counties of Warren, Hamilton and Essex and State of New York, and known and distinguished as township No. 15, Totten and Crossfield's purchase, supposed to contain at this time 24,000 acres more or less, a part thereof having been heretofore sold and conveyed. Also conveys tract of land in township 32. The following exceptions are contained in the deed:

"Also, excepting and reserving to the party of the first part, its successors or assigns, the right perpetually to maintain, use, control and operate the dam now, as well as such as may hereafter be raised, constructed, repaired or improved, at the outlet of Indian lake, and also such other dam or dams as may be constructed across the Indian river, lower down said river (whether located on the above-described land or not); also to flow all the land which the waters raised by such dams will cover; also to flood the lands by drawing waters from the ponds raised by said dams as per the usual course of river driving for lumber purposes; also the right at any and all times of entry and operating upon said lands so far as may be reasonable and necessary to construct, repair and maintain said dams for flooding and driving out logs, and operate and control said dams, and to appropriate and use so much of the rock, stone and soil of said lands as may be reasonably necessary to appropriate or use for constructing and maintaining said dams. The foregoing reservation to be subject, however, at all times to the right of the party of the second part by the superintendent of public works to draw water from the reservoir created by the dam at the outlet of Indian lake, whenever, in his judgment, it shall be required for canal or other State purposes.

79 Also, subject to the right of the purchaser of timber and logs from said lands to sluice such timber and logs over said dam in common with others upon paying the proportionate share of the expense thereof. Such sluicing to be done at the same time with the other owners of logs, thereby economizing the use of water.

The aforesaid rights shall be forfeited and cease, anything hereinbefore contained to the contrary notwithstanding, provided the party of the first part, its successors or assigns, shall neglect or fail

to maintain such dam at the outlet of said Indian lake. A break of said dam or destruction thereof shall not be deemed a failure to maintain the same, provided it shall be properly repaired or constructed within a reasonable time after such injury shall occur.

Also, excepting and reserving 'so much of that tract of land situate in Warren, Essex and Hamilton counties and known as part of township 15 of the Totten and Crossfield's purchase, as is comprised within the route adopted by the Adirondack Railway Company over said township as shown by the maps filed by the said Adirondack Railway Company in said counties.'"

The premises described in this deed are sold subject to all unpaid taxes since 1892, and the party of the second part assumes and agrees to pay off and discharge the same in addition to the consideration expressed in the deed. Acknowledged in Albany county on October 2nd, 1897, and recorded in the office of the clerk of Hamilton county October 8th, 1897, at one o'clock in the afternoon, in Liber 30 of Deeds, at page 539.

Same received in evidence and marked Plaintiff's Exhibit 13.

Plaintiff's counsel offers in evidence a deed in all things identical with the foregoing deed, Exhibit 13, except that the following exception is omitted therefrom:

"Also excepting and reserving 'so much of that tract of land situate in Warren, Essex and Hamilton counties and known as part of township 15 of the Totten and Crossfield's purchase as is comprised within the route adopted by the Adirondack Railway Company over said township as shown by the maps filed by the said Adirondack Railway Company in said counties.'"

The deed now offered was acknowledged in Albany county October 2nd, 1897, and was recorded in the office of the clerk of Warren county on the 7th day of April, 1898, at ten o'clock in the forenoon in Book 80 of Deeds at page 254.

Same received in evidence and marked Plaintiff's Exhibit 14.

Examination of witness continued:

Q. I show you Plaintiff's Exhibit 13. When did you first see that deed and what was done with it?

A. This was presented by Mr. Ashley to the board, October 2nd, 1897. It was placed in a pigeon-hole and remained there until October 7th when I forwarded it for record.

I first saw Plaintiff's Exhibit 14 on October 2nd. That was to be held subject to the direction of the court. That deed is the deed without the exception, which is the deed which they were restrained from delivering. It was handed to me to be recorded if the court should permit the same at the end of the proceedings which were then pending. Yes, that was on the 7th of October. The deed remained in my possession until some time in April, 1898; until I got a certified copy of the order of the court. It was handed to me by Mr. Ashley, who was then counsel in all these matters for the Indian River Company; and it remained in my possession until

the day before it is marked recorded, and then I sent it to the clerk's office to have it recorded.

Cross-examination by Mr. CARR:

Q. Those deeds were not delivered in the forms which they are now?

81 A. The deeds with the strip excepted, Plaintiff's Exhibit 13, the certificate of the county clerk as to the authority of the notary to take the acknowledgment was not attached until the 7th day of October, and as to this deed, Plaintiff's Exhibit 14, it was not attached until the 4th of April.

Q. In all the deeds that were handed to you on September 14th, the certificate as to the authority of the notary was not attached until the 7th of October, was it?

A. No, sir. No, the deed from the Indian River Company that contained the exception of the right of way of the Adirondack Railway Company did not have the certificate of the clerk attached until the 7th day of October, and the deed from the Indian River Company conveying without any exception at all did not have a certificate of the county clerk attached until April, 1898. The deed from the Indian River Company containing the exception was handed to me by Mr. Ashley on the 2nd day of October. Yes, a deed from the Indian River Company for township 15 had been handed to me before that time. That was the one conveying the entire township without any exception.

Q. When was that handed to you?

A. There was no deed executed. A form of deed was made at this meeting—

Q. Was any executed deed handed to you?

A. No, sir.

Q. So that this deed of the 2d of October, from the Indian River Company to the forest preserve board, Exhibit 13, was the first?

A. Yes, sir.

I did not see, prior to the 2d of October, an executed deed from the Indian River Company conveying township 15.

Yes, I understood that prior to the 2d day of October an injunction was pending. I could not tell when that injunction was served. It was prior to the 2d of October, at all events. Yes, on the 2d of October I was aware of the fact that proceedings were pending for the vacation of the injunction. I could not say when the motion for the vacation of the injunction was argued. There

82 was an application made *ex parte* on the papers before Judge

McLaughlin. Yes, the injunction was made by him and a motion was made before him to vacate that injunction on the papers on which it was granted. I could not say just what time in October it was argued. It was, at all events, within two or three days after the 2d of October. Yes, that motion was denied. I was present at the time when that motion was argued. I went down to the city of New York.

Q. Did you go there as the attorney for the forest preserve board? Did you not go there and represent them?

A. The forest preserve board did not appear on that argument.
Q. Did you go down there as the attorney for the forest preserve board—in the interest of the forest preserve board?

A. Yes, sir.

Yes, I am able to say whether these deeds or any of them were taken to New York at that time. It is my best recollection that I took them down, because I know I took down a bunch of papers, and it is my recollection that they were among them, I mean the deeds giving title from the Indian River Company. Yes, it is my impression that I took them down there with me. I brought back all the papers I took down with me.

Q. You spoke about the service of some papers on the 7th day of October on the president of the Indian River Company.

A. Yes, sir, on Mr. William McEchron of Glens Falls, New York.

I served the papers which were marked Plaintiff's Exhibit 11. That is a certified copy of the paper on file in the county clerk's office. Yes, it purports to be the same resolution of the forest preserve board.

Q. Where did you serve that on Mr. McEchron?

A. In the office of the forest preserve board. I didn't serve it, Mr. Cole served it, Mr. John A. Cole.

At the time it was served my impression is that Mr. Ashley and Mr. Fowler and Mr. McEchron and Miss Griffin, the lady 83 stenographer, were present. Mr. Casey was not there. I think the commissioners were there at the time I signed the papers and stepped down to the secretary of state's office to file the papers and came right back.

Q. When you say you stepped down to the secretary of state's office and filed the papers and came right back, what papers do you mean?

A. The notice which appears on that paper (indicating paper marked Plaintiff's Exhibit 11).

Q. And that was the one you filed in the secretary of state's office?

A. Yes, sir: about 11:50 a. m.

Q. Did you take any particular notice of the time you did so?

A. I took notice of the time it was served on Mr. McEchron because it was immediately after I had stepped downstairs to the secretary of state's office and filed the paper.

Q. Was anything said by anybody else there with regard to the time when service was made on Mr. McEchron?

A. I don't think there was any reference made to it, except with reference to securing the county clerk's certificate; and I assumed that it had to be obtained before twelve o'clock.

Yes, at the time the service was made on Mr. McEchron, the affidavit of service was all prepared and ready for signature and was signed.

After the service was made on Mr. McEchron it is my recollection that Mr. Fowler took all the papers down to the clerk's office for the certificate. No; I didn't go. I think I was there in the office

for the next half hour, and then I went down to the Delaware & Hudson depot, where I met you.

I do not know whether Mr. Ashley and Mr. McEchron remained in the office until I went down to the depot, or whether they went out; I couldn't swear definitely. It is my impression that they went out and then came back.

Q. Did you go down to the depot with them or did you find them there when you got there?

A. We had separated; part of us went together and part of us went somewhere else, and we all came together about at that 84 little fruit stand on Maiden lane. Yes; we all got together and went north on the train and that was on the 7th day of October.

At the time that transaction took place I was acting in connection with what went on in this matter as the attorney for the forest preserve board, and I had been attorney for some time previous with regard to this township 15. Yes; I understood on the 7th day of October that the Adirondack Railway Company filed a right of way over township 15, and I understood that these proceedings were taken on the 7th day of October by the forest preserve board; that a map was still on file in all the clerks' offices that affected township 15; I think that that was understood by the members of the forest preserve board. No; I have not any doubt about it.

Yes; I understood that after, or subsequent to that time, proceedings had been begun to condemn a right of way over township 15. The first hearing to be had, so far as these papers were concerned, was at the November term of the court in Warren county. I was there at that time acting for the forest preserve board.

Q. Did you join in the application for an adjournment of the proceedings at that time?

A. I asked you to have it adjourned and you kindly consented.

Yes; I understood they were adjourned until the 21st of December, 1897. I could not tell you whether prior to the 21st of December I took any other steps to have these proceedings adjourned to a later time.

Q. Don't you remember that it was your suggestion that they be adjourned and that nothing be done in the matter until the determination of the appeal that was then pending to vacate the injunction?

A. I know that that was my idea and I talked with you about it. Somewhere just then I dropped it.

Q. The last that you did, if anything, to have them adjourn was what you did in conference with me when you expressed that view that it ought to be withheld until the decision of the appeal—that is, the decision of the appeal, not the argument?

A. Yes, sir; I said the decision, not the argument.

85 Q. I take it that you knew when the appeal was argued, did you not?

A. No, sir; I wanted your wishes consulted as to when it should be brought on and your engagements consulted, that you had consulted our exigencies and we wanted to know your wishes.

Yes, the result was that it went over into January to be argued. I know there was some friction at that time.

Q. I show you a letter purporting to be written December 17th, 1897, and ask you if it is a letter written by you to me on the subject.

A. Yes, sir.

Letter marked Defendants' Exhibit A for identification.

Those deeds with the exception of Plaintiff's Exhibit 14—the one without the exception—I delivered on board the train to Mr. Fowler to take up for record. The notices of condemnation that were to be recorded in Warren county I delivered to the clerk of Warren county.

Q. When did this service take place?

A. About ten minutes to twelve o'clock. I desire to explain. I wanted to get a clerk's certificate in order that this record of condemnation might be recorded in the various county clerks' offices, and I assumed that possibly the clerk's office closed at noon, and I endeavored to get there at that time, and it was for that reason I took out my watch, and it was between from ten to five minutes to twelve o'clock.

Q. Do you remember what day of the week this was, it was not Saturday?

A. No, sir; it was simply because in the country our clerk's office closes at noon that I tried to get there before twelve o'clock.

Q. I show you another letter and ask you if that one was written by you at about the time that bears date—October 11th, 1897.

A. I sent such a letter to you and also one to Mr. Moffat.

Letter marked Defendants' Exhibit B for identification.

86 FOSTER B. MORSS, being duly sworn as a witness for plaintiffs, testified as follows:

Direct examination by Mr. PAIGE:

I reside at Saugerties, New York, and am a civil engineer by profession.

Q. In the year 1897, after the 6th of August, were you at any time on township 15?

A. I was at Indian lake if that is in township 15, I was at the outlet of the lake and also up above.

I was there making some surveys for a dam. I was sent there by the State engineer. I was in the employ of the State engineer at the time. I was there about the 15th or 16th of August, 1897, and remained there between two and three weeks.

Q. What did you do?

A. We run a line for the location of a dam and put some levels.

Q. I suppose you cut out some trees and drove some stakes?

A. We drove some stakes and cut some brush, there were no trees there.

Q. That is all you did up there, you made a survey for a dam?

A. Yes, sir.

Q. Under the direction of the State engineer?

A. Yes, sir.

Right after the making of the survey I helped prepare plans and specifications.

Cross-examination by Mr. CARR:

I went up there shortly after the 15th of August. Yes, this was at the outlet of Indian lake, and this dam was to be one at the outlet of Indian lake. It was contemplated to raise the water in the lake. Yes, those were the only surveys I made there and whatever brush I cut was in connection with this survey and whatever stakes I drove were in connection with these surveys. I surveyed for a dam by which it was expected to raise the water of Indian lake I think twenty or twenty-three feet, and that was all I did in connection with the dam. It was to determine something of the character of the place.

87 Redirect examination by Mr. PAIGE:

Q. Was the object of the dam to supply water to the Champlain canal?

Objected to as incompetent and improper and not the best evidence, nor does it appear what the purpose of the raising of the waters was. Objection overruled. Exception.

A. It was, partly, yes, sir.

I was there between two and three weeks. We went up, I think, the week of the 15th, and stayed three or four days, and came back to Albany. We went back on the Tuesday following and remained nearly two weeks. There were four of us in the party besides some men we hired up there. I think we had four when we went up and I think we hired six or seven laborers up there.

Recross-examination by Mr. CARR:

Q. You say that this dam was built for the purpose of supplying water to the Champlain canal; what was the other partly for?

A. The other part was for water power on the Hudson river.

Q. On the stream that runs out of Indian lake, was it?

A. No; in the Hudson river proper.

Plaintiff's counsel offered in evidence the following evidence from the minute book of the forest preserve board, being an extract from the minutes of the meeting of said board held on the 1st day of October, 1897.

Same received in evidence and marked Plaintiff's Exhibit 15, as follows:

ALBANY, October 1st, '97.

The forest preserve board met at its office in the capitol, pursuant to call of the chair.

There were present Commissioners Woodruff, Babcock and Adams.

President Woodruff in the chair.

The Adirondack R. R. Co. appeared before the board, by 88 counsel, and served a copy of summons and complaint, affidavits, preliminary injunction, and order to show cause in an action entitled—

Supreme Court, Essex County.

ADIRONDACK R. R. CO. }
vs.
THE INDIAN RIVER CO. ET AL. }

After hearing Messrs. McEchron, Underwood, Ashley and others Mr. Adams offered the following resolutions:

Resolved, That upon the filing of the bond of the Indian River Company for the full completion of the dam at present in course of construction in accordance with the contract and specifications attached to said bond, this board accepts the deed tendered, covering about 18,000 acres of land, in township 32, T. and C. P., and about 24,000 acres of land in twp. 15, T. and C. P., and that the sum to be paid therefor, including the present structures thereon, and certain structures contracted for and in process of construction by said Indian River Co., together with all damages accruing from such appropriation of said land and structures to be \$164,000, and that a certificate for that sum be issued by this board in full payment therefor; and that of said sum \$99,000 shall be immediately due and payable upon the filing with the comptroller of the certificates of the clerks of Hamilton, Warren and Essex counties on the recording of said deed; that \$15,000 shall be due and payable upon the filing with the comptroller of the certificate of the State engineer that the shores of Indian lake have been cleared in accordance with the terms of the before-mentioned contract, subject, however, to the deduction of such sum as may be required to settle any judgment of the Court of Claims for the condemnation of any land within the limits of the flow-line of the new dam which the parties of the first part may request the State to take; of the remaining \$15,000, \$15,000 shall be due and payable on or after

89 May 1st, 1898, upon the filing of a certificate of the State engineer that sufficient work has been duly and properly performed, under the existing contract between the Indian River Co. and Michael McDonough and others to justify, under the engineer's estimate, the payment by the Indian River Co. to said contractors the sum of \$25,000; \$10,000 shall be due and payable on or after July 1st upon the filing of a similar certificate by the State engineer showing that, under the engineer's estimate \$45,000 is due to said contractors; \$15,000 on or after September 1st, upon

the filing of the certificate of the State engineer showing that upon the engineer's estimate the sum of \$70,000 is due to said contractors; and the remaining \$10,000 upon the filing of the certificate of the State engineer that the work has been completed in all respects in accordance with the plans and specifications which are a part of the contract annexed to the above-mentioned bond. And that the above-mentioned bond shall be deemed to be satisfied and discharged upon the filing of said final certificate of the State engineer.

And that it is understood and agreed by and between the forest preserve board and the Indian River Company that if the Indian River Co. shall themselves, after due effort, be unable to acquire the interest of any land-owners whose land lies within the limits of the flow-line of the dam above referred to upon the request of said Indian River Co. the State will institute proper proceedings, under the statute, for the purpose of acquiring such land.

After due and careful consideration of the resolution of Mr. Adams it was adopted with the following amendment:

"That inasmuch as the Indian River Co. has been enjoined from transmitting to the State about 100 acres of township 15, and made application to the court to set aside said injunction, that this board accept a deed of townships 32 and 15 with the reservation of the right of way together with an agreement from the Indian River Company to make no claim against the State by reason of any judgment it may obtain in the Court of Claims in case the State shall proceed to condemn said 100 acres reserved in said deed, and that in case said injunction shall be dissolved, and the proposed 90 original deed shall be delivered, that then said deed and agreement above mentioned shall be deemed null and void as the original deed shall be received in lieu thereof, and that, upon the receipt of said original deed, the certificate referred to in Commissioner Adams' resolution shall then issue, and that in case the board shall be advised that the court has refused to dissolve the injunction, that proper condemnation proceedings shall be immediately instituted and the notice served forthwith and upon the service of the notice the certificate shall issue."

The plaintiff's counsel offered in evidence order of the appellate division in the third department, entered in the office of the clerk of Essex county on the 11th day of April, 1898.

Same received in evidence and marked Plaintiff's Exhibit 16, as follows:

At a term of the appellate division of the supreme court, in the third department, held in its court-house in the city of Albany, N. Y., on the 2d day of March, 1898.

Present: Hon. Charles E. Parker, P. J.; Hon. D. Cady Herrick, Hon. Judson S. Landon, Hon. John R. Putnam, Hon. Milton E. Merwin, J. J.

ADIRONDACK RAILWAY COMPANY, Plaintiff and Respondent, }
 against }
 INDIAN RIVER COMPANY, WILLIAM McECHRON, and Others, Defendants and Appellants. }

The appeal of the defendants from the order in this action
 91 made at a special term at Plattsburgh, N. Y., on the 16th day of October, 1897, continuing the injunction therein described, having been heard and considered; now, on motion of the attorneys for the defendants, it is—

Ordered that said order so appealed from be and is reversed, and that the injunction granted in this action by Mr. Justice McLaughlin be and is wholly vacated, with ten dollars costs and 65.42 dollars disbursements.

V. W. PRIME, *Dep. Clerk.*

Plaintiff's counsel offered in evidence a certified copy of the judgment-roll of the proceedings for the condemnation of real property instituted by the Adirondack Railway Company against the Indian River Company and others, filed in the office of the clerk of Warren county on the 18th day of March, 1898. Said record consisted of the following papers:

(1.) Notice dated October 7th, 1897, of presentation of petition at Caldwell special term on the second Monday of November, 1897, signed by Lewis E. Carr, attorney for the Adirondack Railway Company.

(2.) Petition for condemnation of real property, dated and verified October 7th, 1897.

(3.) Affidavit of service of petition and notice as follows: On—

Phebe A. Hitchcock, October 7th, 1897, at 11.25 a. m.

Isabella Finch, October 7th, 1897, at 2.05 p. m.

Elizabeth Ashley, October 7th, 1897, at 2.50 p. m.

Indian River Co., October 7th, 1897, at 7.17 p. m.

Eugene L. Ashley, October 7th, 1897, at 8.15 p. m.

Daniel J. Finch, October 7th, 1897, at 8.35 p. m.

Jeremiah W. Finch, October 9th, 1897, at 5.45 p. m.

Augusta Finch, October 13th, 1897, at 12.22 p. m.

92 Margaret McGinn, October 13th, 1897, at 4.30 p. m.

John McGinn, October 14th, 1897, at 7 a. m.

(4.) Notice dated October 19th, 1897, of presentation of petition of Caldwell special term on second Monday of November, 1897 (second proceeding), signed by Lewis E. Carr, attorney for Adirondack Railway Company.

(5.) Petition for condemnation of real property (second proceeding), dated and verified October 19th, 1897.

(6.) Affidavit of service of petition and notice (second proceeding), as follows: On—

Phebe A. Hitchcock, October 25th, 1897, at 3.35 p. m.

Elizabeth Ashley, October 25th, 1897, at 4.05 p. m.

Isabella Finch, October 25th, 1897, at 6.10 p. m.

Daniel J. Finch, October 25th, 1897, at 6.10 p. m.

Indian River Company, October 25th, 1897, at 6.25 p. m.

Eugene L. Ashley, October 26th, 1897, at 8.45 a. m.

Jeremiah W. Finch, October 29th, 1897, at 11.50 a. m.

Augusta Finch, October 29th, 1897, at 11.50 a. m.

John McGinn, October 26th, 1897.

Margaret McGinn, October 26th, 1897.

(7.) Answer of defendant Indian River Company by Ashley, Williams & Fowler, its attorneys, verified November 9th, 1897.

(8.) Answer of defendants Eugene L. Ashley, John McGinn and Jeremiah W. Finch by S. & L. M. Brown their attorneys, verified November 10th, 1897.

(9.) Answer of defendants Daniel J. Finch and Isabella his wife, Elizabeth Ashley, Margaret McGinn, Augusta Finch and Phebe A. Hitchcock by Ashley, Williams & Fowler, their attorneys, verified November 10th, 1897.

(10.) Order made at special term, Essex county, on December 21st, 1897, Hon. Chester B. McLaughlin, justice presiding, adjourning trial of both proceedings to the second Saturday of February, 1898, and transferring the hearing and trial thereof to special term to be held at Plattsburgh on such day.

(11.) Order of reference to Hon. L. L. Shedd, of Plattsburgh, to hear and determine, said order being entered on the consent of the attorneys for the defendants at a special term of the supreme court, held at the court-house in Plattsburgh on March 12th, 1898, Hon. S. A. Kellogg, justice, presiding.

(12.) Oath of referee sworn to March 12th, 1898.

(13.) Decision of referee, dated March 12th, 1898.

(14.) Waiver of notice of application for the appointment of commissioners, dated March 12th, 1898, and signed by S. and L. M. Brown and by Ashley, Williams & Fowler, attorneys for defendants.

(15.) Judgment made at special term of the supreme court, held at the county court-house in the village of Plattsburgh, on March 12th, 1898, Hon. S. A. Kellogg, justice, presiding, the mandatory part of which judgment was as follows:

"Now, on motion of Lewis E. Carr, attorney for plaintiff,

Adjudged, that the plaintiff is entitled to the relief demanded in its said petition herein. And it is further

Adjudged, that the condemnation of the following-described real property is necessary for the public use, that is to say: All that certain strip or parcel of land in the town of Johnsburg, county of Warren and State of New York, six rods in width, which lies in township 15 of the Totten and Crossfield purchase, and crosses the following lot numbers of said township, that is to say," (here follows a list of the lot numbers crossed), the courses and curvatures of said strip of land more fully and definitely appearing upon a map

94 of the route adopted by said Adirondack Railway Company in the county of Warren, signed by the president and engineer of said company and filed in the office of the clerk of said Warren county on the 18th day of September, 1897. And it is further

Adjudged, that the plaintiff, Adirondack Railway Company, is entitled to take and hold said property for the public use specified, to wit: the construction, operation and maintenance of the line of its railway, upon making compensation therefor. And notice of application therefor having been waived, it is further

Adjudged, that Edgar Hull, William Moore and James Warren, all of Glens Falls, Warren county, disinterested and competent free-holders and residents of the fourth judicial district of the State, be and they hereby are appointed commissioners to ascertain the compensation to be made to the owners of said property to be so taken for said public use; the first meeting of said commissioners to be held at Saratoga Springs, New York, on the 25th day of March, 1898, at two o'clock in the afternoon.

S. A. KELLOGG,
Justice Supreme Court.

Same received in evidence and marked Plaintiff's Exhibit 17.

Plaintiff's counsel offered in evidence certified copy of judgment-roll of the proceedings for the condemnation of real property in Essex county instituted by the Adirondack Railway Company against the Indian River Company and others. The papers in said judgment-roll were similar, except as to the description of the real property affected, to those contained in the proceedings brought in Warren county, as shown by Plaintiff's Exhibit 17 above.

Said judgment-roll was entered in the office of the clerk of Essex county on the 18th day of March, 1898, at nine o'clock in the forenoon.

Same received in evidence and marked Plaintiff's Exhibit 18.

95 Plaintiff's counsel offers in evidence certified copy of judgment-roll of the proceedings for the condemnation of real property in Hamilton county instituted by the Adirondack Railway Company against the Indian River Company and others. The papers in said judgment-roll were entered in the office of the clerk of Hamilton county on the 18th day of March, 1898, at eight o'clock in the afternoon.

Same received in evidence and marked Plaintiff's Exhibit 19.

It is stipulated, for the purposes of this trial only, that the day and hour of the filing of the *lis pendens* in each of the counties of Essex, Warren and Hamilton, was the day and hour of the recording of such *lis pendens*, and that the same was on such day and hour duly indexed against each of the defendants in each of said counties, and that the notices of pendency of these condemnation proceedings were filed respectively in the offices of the clerks of Warren, Essex and Hamilton counties as follows:

In the office of the clerk of Warren county (first proceeding) on October 7th, 1897, at twelve o'clock noon; (second proceeding) on October 26th, 1897, at nine o'clock in the forenoon.

In the office of the clerk of Essex county (first proceeding) on

October 7th, at 2.50 o'clock in the afternoon; (second proceeding) October 25th, 1897, at 4.30 o'clock in the afternoon.

In the office of the clerk of Hamilton county (first proceeding) on October 7th, 1897, at 1.15 p. m.; (second proceeding) October 25th, 1897, at 6 p. m.

Plaintiff's counsel offered in evidence motion papers on the part of the People of the State of New York entitled in each of these proceedings for leave to intervene and be made parties therein.

Objected to as immaterial. Objection overruled. Exception.

Received and marked in evidence Plaintiff's Exhibit 20.

96 It is conceded by defendants that such motion is still pending.

Plaintiff rests.

It is admitted for the purposes of this trial that no application has been made to change the location of the line appearing on the maps filed by the Adirondack Railway Company showing location of the road adopted by it across township 15.

It is admitted that this action was commenced by the service of the summons and of a copy of the complaint upon Mr. Charles A. Walker, secretary of the Adirondack Railway Company on the 25th of March, 1898.

Defendants' counsel offers in evidence extract from the minutes of the forest preserve board of a meeting of said board held October 7th, 1897.

Same received in evidence and marked Defendants' Exhibit C, as follows:

ALBANY, N. Y., October 7, 1897.

The forest preserve board met at its office pursuant to call issued by the president.

"To Hon. Campbell W. Adams and Hon. Charles H. Babcock.

GENTLEMEN: It seems necessary that there should be a special meeting of the forest preserve board. Therefore, pursuant to the resolution of adjournment that the board should meet subject to the call of the chair, I hereby call a special meeting of the forest preserve board to meet in its office at the capitol in Albany, N. Y., on the 7th day of October, at 11.30 a. m.

TIMOTHY L. WOODRUFF,
President F. P. B.

There were present Commissioners Adams and Babcock.

On motion of Commissioner Adams, Commissioner Babcock was elected temporary president, and John S. Casey was instructed to act as temporary secretary.

97 Relative to the proceedings in the meeting of October 1st, as to the Indian River Company, J. P. Allds, attorney for the board, reported as follows:

I desire to report to you that upon the *ex parte* application, argued before Judge McLaughlin, he refused to vacate the temporary in-

junction which had been granted upon the *ex parte* application; that he likewise refuses to make a condition of his order that the plaintiff, The Adirondack Railway Co., should be stayed from filing *lis pendens* until the hearing of the motion on its merits October 11th, and that the conditions contemplated in Commissioner Adams' resolution of the meeting held October 1st and 2d is before the board, viz: the refusal to vacate the injunction so that the original deed can be delivered before the time expires under which the railroad company will have the right to bring condemnation proceedings and file *lis pendens*, and that in pursuance of that resolution, I have requested a certificate from the State engineer of an accurate description of the land reserved in the deed from the Indian River Company, which was accepted at the last meeting. And I do further report that the description is here present before the board, and that it covers land which adjoins lands already owned and appropriated by the board.

On motion of Mr. Adams, the report of Mr. Allds was received and ordered filed.

Commissioner Adams offered the following resolution, which was adopted:

Resolved, That the board endorse upon the description of the land furnished by the State engineer the certificates required by statute, and that the lands therein described be and hereby *is* condemned for the purpose of making them a part of the Adirondack park, and that said certificate, together with the endorsement of the board, be immediately filed in the office of the secretary of state, and that forthwith and hereafter the proper notice required by section 4 of chapter 220 of the Laws of 1897 be signed and served upon the owner of said land, and that copies of such notice and proof of service upon the owner be forwarded to the county clerk's office of Essex, Warren and Hamilton counties for record, in pursuance of the provisions of said section 4 of chapter 220 of the Laws of 1897.

98 Defendants' counsel offered in evidence affidavits showing services of the notice of filing of the maps in the several counties of Warren, Hamilton and Essex as follows, on—

John McGinn, September 21st, 1897.

Daniel J. Finch, September 21st, 1897.

Glens Falls Paper Mill Company, September 21, 1897.

Indian River Company, September 23rd, 1897.

Eugene L. Ashley, September 28rd, 1897.

Pheobe A. Hitchcock, September 23rd, 1897.

Jeremiah W. Finch, October 1st, 1897.

Same received in evidence and marked Defendants' Exhibits D, E, F, and G.

EUGENE L. ASHLEY, being duly sworn as a witness for defendant, testified as follows:

Direct examination by Mr. CARR:

I reside at Glens Falls, New York, and am an attorney-at-law. Yes, I am the Eugene L. Ashley who has been named as represent-

ing the Indian River Company in connection with township 15, and am one of the defendants to this action. Yes, I was one of the defendants in the condemnation proceedings for a right of way of the Adirondack Railway Company over township 15.

I was present all through the meeting of the forest preserve board held on October 7th, 1897. I was present there at the time a copy of the resolution was served upon the president of the Indian River Company on behalf of the State—Plaintiff's Exhibit 11. That service took place in the rooms of the forest preserve board. It was after the meeting of the forest preserve board had been held.

Q. Are you able to say what time of day it was that that service was made?

A. I would like to state the circumstances. We had been 99 lingering around there all the forenoon for the purpose of getting this matter in shape, and the forest preserve board had been in session and the papers executed and Mr. Allds went out. I remember Mr. Fowler's saying to me that he expected to go to the various county clerks' offices to file these papers and that they wanted to get these certificates; and they telephoned over to the county clerk's office about it. Then Mr. Allds came into the room and asked for Casey, who was not present, and he turned to Mr. Cole. Mr. McEchron and I were there, and I was nervous for fear we would miss the train. Mr. Allds turned to Mr. Cole and told him to serve Mr. McEchron, and we all looked at our watches and it was a quarter to one o'clock. We then went out and we all met at the station. I remember I stopped on the way to the station at a news-stand on Maiden lane just below Pearl street and bought a fountain pen. We didn't have our papers completed and we completed our papers going up on the train from here.

Q. What papers do you refer to as not completed?

A. The papers to file in the county clerk's office. We were to have them filed in the county clerk's office and he was to note the time of day of its receipt by him and enter it on — record—the time of its receipt by him, and it was these papers we completed on the train.

No, I was not present at the Warren county term in November when the condemnation proceedings in behalf of the Adirondack Railway Company for this right of way over township 15 first came up.

Q. Previous to that time, or subsequent to that time, did you have any conference or interview with Mr. Allds so that you were able to talk over any answer that was put in?

A. Mr. Allds and myself were preparing the answer in my office in Glens Falls and he took a carriage and drove over. I mean the answer in proceedings taken by the Adirondack Railway Company. Yes, that answer was drawn and served, and that is the one that Mr. Allds and I were engaged in preparing at that time.

100 Cross-examination by Mr. PAIGE:

Yes, I was present at the court-house in the village of Plattsburgh on the first day of March, 1898, when the Adirondack Rail-

way Company's condemnation proceedings came on. I had had notice from time to time of the adjournment of those proceedings. I had the usual notice that an attorney gets from time to time in a case that there was something to be done in the matter on the 12th day of March at Plattsburgh.

Q. What notice did you get that the proceedings had been adjourned to a day in the future to be fixed upon?

A. No, sir, it was adjourned to a definite day from time to time.

Q. When was the adjournment made to the 12th of March?

A. On the 12th of February.

Q. Mr. Ashley, did you notify anybody in the employ of the State that there was to be such a hearing on the 12th of March?

A. I could not say that I stated that the hearing was to go on the 12th of March, but I notified Mr. Allds by letter. This proceeding had just been adjourned from time to time pending the appeal to the appellate division from the injunction order; and it was understood by Mr. Allds and myself that if the decision was satisfactory to the forest preserve board and the State, and the injunction was dissolved that they should then file the deed that was delivered in escrow, and that there would be no other proceeding on the part of the State, and that the deed vested complete title in the State, and the proceedings ended. I came to Albany about a week before the 12th and asked Mr. Carr if he expected to go on with it, and he said he did; and I went up to the forest preserve board, and searched for Mr. Allds, but didn't see him. I wrote a letter to him in which I said that there had been a decision of the appellate division which was favorable to the forest preserve board and that I understood there was nothing further to be done on my part: and, in the meantime, in a conversation with Mr. Carr, he stated that if I made a fight on behalf of our clients he would expect us to pay the 101 costs. I told him I didn't care to burden my clients with costs. I had heard nothing from Mr. Allds and I went to Plattsburgh and I expected that somebody would be there. I just stayed there and carried out what I understood to be the understanding.

Q. You made the consent described in the record?

A. I could not say as to that. If you will show it to me I can tell you whether I did.

Q. An order is made referring the issues to L. L. Shedd; on the same day Mr. Shedd made his findings of fact. Did you appear before Mr. Shedd?

A. I was there; yes, sir.

Q. Did you appear?

A. Yes, sir; I was there. I don't know whether I appeared or not.

Q. You were entitled to notice before Mr. Shedd?

A. Yes, sir.

Q. Unless you appeared, Mr. Ashley, the findings of fact are not good for anything?

A. I think I examined the witness.

Q. On the same day the report of Mr. Shedd was presented to

the court and the record contains a notice of application for the appointment of commissioners to condemn lands sought to be taken in the proceedings; and a stipulation purporting to be signed by S. & L. M. Brown and by Ashley, Williams & Fowler?

A. That was signed subsequent to that.

Q. Did you sign such a stipulation?

A. Yes, sir.

Q. And did you appear when the court on the same day gave the adjournment?

A. Yes, sir. I appeared before Judge Kellogg and stated to him the situation.

Q. Will you send me a copy of that letter you have spoken of that you sent to Mr. Allds?

A. Yes, sir.

WILLIAM McECHOX, being duly sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. CARR:

102 I live at Glens Falls, New York. Yes, I was president of the Indian River Company. That corporation was organized some time in 1897.

Q. And were you also one of the owners of an interest in township 15?

A. Not until the Indian River Company bought township 15.

Q. And about when was it that the Indian River Company was organized?

A. Well, I should have to guess at that.

Q. Was it in September, 1897?

A. In September, I would think. I have no memorandum of it now.

Yes, I was present here in Albany, in the office of the forest preserve board, on October 7th, 1897. I am the person on whom notice of the resolution of the forest preserve board was served that day. That took place at the rooms of the forest preserve board.

Q. Are you able to say the hour and minute of the day that service took place?

A. Not as to minutes.

Q. What is your best recollection?

A. I might explain that at the time it was served I made a note on the wrapper of the paper with pencil at the suggestion of Mr. Ashley. I do not now know where that paper is. I should say it was some time between twelve and one o'clock. I don't know now where that paper is. The paper was served on me some time between the hours of twelve and one o'clock.

By Mr. PAIGE:

Q. Do you remember anything about it?

A. I remember it is safe to say between twelve and one.

By Mr. CARR:

After the service of that paper was made we went to the one o'clock train and we stopped on our way down at a book store. We all started very soon after it was served for the train. Yes, we stopped at a fruit stand down near the depot, and I should say that the one o'clock train left within five minutes after we reached there.

Q. What is your best recollection as to the length of time after the service of the copy of the resolution until your arrival at the depot?

A. Thirty minutes.

103 FRANK D. ANTHONY, sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. MOFFAT:

I am a civil engineer by profession, and was in charge of the surveys of the line across township 15 adopted by the Adirondack Railway Company. Yes, I am familiar with that locality.

Q. What is the character of that land?

A. Forest land.

EUGENE L. ASHLEY, recalled as a witness on behalf of the defendants:

Direct examination by Mr. CARR:

Q. I show you some deeds and papers that are marked Plaintiff's Exhibit 1 to Plaintiff's Exhibit 10 inclusive. Do you recognize these papers?

A. Yes, sir; I prepared them.

Q. And after their preparation and execution what was done with them?

A. I prepared most of them; they were prepared in my office. They were delivered to Mr. Allds of the forest preserve board.

Q. When were they given to him?

A. They were given to him on the train the day we went to New York to argue the motion before Judge McLaughlin to vacate the injunction, on Monday, October 4th.

Q. They were delivered to Mr. Allds on that day going down to New York?

A. Yes.

LEWIS E. CARR makes a statement on behalf of the defendant as follows:

I was the attorney for the Adirondack Railway Company in the action in which an injunction was obtained. The hearing of the motion to vacate that injunction on the papers was fixed by Judge

McLaughlin to be heard before him at the Manhattan hotel, 104 New York, on the evening of October 4th, 1897, for the reason that he was assigned to hold a term of court there commencing Monday, and this was Monday evening and he would have

no opportunity to hear it in Essex county. All the parties interested appeared before him on that motion when it was argued.

The condemnation proceedings that came on in November at Caldwell were adjourned by consent of all parties to be heard by Judge McLaughlin December 21st.

The two proceedings were instituted in each county for the reason that fifteen days had not elapsed after the serving on Jeremiah W. Finch of the notice of the filing of the maps when the first proceeding was commenced; but aside from that the two proceedings were identical and it was arranged by Mr. Allds representing the forest preserve board and by Mr. Ashley and myself, that the proceedings should be tried and considered as one proceeding.

The time fixed was December 21st. Before that came around, Judge McLaughlin was appointed to the appellate division of the first department, and it was apparent that the hearing could not be had before January, and upon the consent of all parties appearing it was agreed that the hearing and all proceedings be transferred before Judge Kellogg, the time as I remember being January 21st; but in January a further adjournment of the proceeding was had to the 12th of February, and on the 12th of February a further adjournment was had to the 12th day of March. All the proceedings were regularly adjourned by the stipulation of the attorneys representing the different parties.

By MR. PAIGE:

Q. It was agreed that when the hearing of the appeal was put over the November term that these proceedings should go over until the decision of the appeal?

A. Not exactly agreed, but there was that understanding.

Defendants' counsel offers in evidence letter from J. P. 105 Allds to Mr. Carr dated December 17th, 1897, marked Defendants' Exhibit A for identification.

Received in evidence and marked Defendants' Exhibit A, as follows:

Timothy L. Woodruff, Brooklyn, president; Charles H. Babcock, Rochester; Campbell W. Adams, Utica; Merton E. Lewis, secretary.

STATE OF NEW YORK,
THE FOREST PRESERVE BOARD, ALBANY, Dec. 17, 1897.

Mr. Lewis E. Carr, Albany, N. Y.

DEAR SIR: I am in receipt of your favor of Dec. 15th, and am pleased to note that the case is to go over into January. I think myself that it should be until after we get the decision—rather than until after the argument in the appellate court.

Yours very truly,

JOTHAM P. ALLDS.

Defendants' counsel offered in evidence a certified copy of the certificate of incorporation of the Adirondack Railway Company.

Same received and marked in evidence Defendants' Exhibit D.

Said certificate recites, among other things, the following:

That the Adirondack Company was incorporated October 24th, 1863, in pursuance of chapter 236 of the Laws of 1863, entitled "An act to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of this State and the development of the resources thereof."

That immediately after it was incorporated said Adirondack Company commenced the construction of its railroad and proceeded in the other business for which it was incorporated, and in the course of such business acquired certain lands in said wilderness.

That subsequent to and in pursuance of chapter 250 of the Laws of 1865, entitled "An act to authorize the Adirondack Company to extend its railroad to Lake Ontario and the River St. Lawrence, and to increase its capital," said Adirondack Company amended its articles of association so as to enable it to extend its railroad from its original terminus in the town of Newcomb, county of Essex, to a point on the St. Lawrence river, in the town of Oswegatchie, in the county of St. Lawrence, making the whole length of its railroad, including such extensions, as near as may be, 185 miles of railroad line passing through and into the counties of Warren, Essex and Hamilton, among others; and that it did increase its capital stock, and that the amended articles of association were filed in the office of the secretary of state on March 1st, 1871.

That on or about July 1st, 1872, said Adirondack Company mortgaged to a trustee in said mortgage named, all and singular its railroad and property connected therewith together with the rights, privileges, franchises and immunities of said Adirondack Company in trust to secure the payment of its bonds to be issued in pursuance of such mortgage, which bonds were duly issued.

That subsequently said Adirondack Company made default in the payment of the interest of said bonds, and that suit was brought to foreclose said mortgage, and that such proceedings were had in said suit that a judgment was made and entered therein on the 28th day of June, 1881, foreclosing said mortgage and directing that the whole of the property, rights and franchises covered by said mortgage be sold as in said judgment directed.

That said property, rights and franchises were accordingly sold under said decree and were purchased by and conveyed to William Sutphen and William W. Durant by deed dated October 21st, 107 1881, and that said Sutphen and Durant acquired title to all the railroad, mortgaged lands and other property, franchises, privileges, easements, rights, immunities and liberties of said Adirondack Company covered by or included in said mortgage.

That said purchasers associated with themselves certain other individuals in said certificate named, all being residents and citizens of the State of New York, in order to be incorporated and to become a body politic and corporate, to take, hold and possess the title and property included in said sale, and to have all franchises, rights, powers, privileges and immunities which were possessed

before such sale by said Adirondack Company, and to take and receive a conveyance of and to succeed to, possess and exercise and enjoy all the rights, powers, franchises, privileges, easements, liberties, immunities, property, estate and effects, of which the title had been acquired at said foreclosure sale.

That this certificate was made for the purpose of incorporating such purchasers and associates as a new company, corporation and body politic and corporate, pursuant to chapter 469 of the Laws of 1873, and chapter 430 of the Laws of 1874, and chapter 446 of the Laws of 1876.

That the name of the new company and corporation intended to be formed by this certificate is the Adirondack Railway Company.

That said new corporation shall continue one thousand years.

That the railroad of said new company constructed and to be constructed and to be maintained and operated shall extend from a point in the town of Saratoga Springs, in the county of Saratoga, to a point in the town of Hadley, in said Saratoga county, and thence up and along the valley of the upper Hudson up to the town of Newcomb in the county of Essex, and thence to the River St. Lawrence at or near the city of Ogdensburg.

That the length of said road is to be 185 miles.

108 That the names of each and every county of the State of New York through and into which said railroad is made and intended to be made are as follows: Saratoga, Warren, Essex, Hamilton, Franklin and St. Lawrence.

That the acts of the legislature under which said Adirondack Company was organized and the subsequent acts amending the same or additional thereto are as follows:

Laws of 1850, chapter 140; Laws of 1854, chapter 282; Laws of 1863, chapter 236; Laws of 1864, chapter 582; Laws of 1865, chapter 60; Laws of 1865, chapter 250; Laws of 1867, chapter 775; Laws of 1868, chapter 718; Laws of 1868, chapter 850; Laws of 1871, chapter 857; Laws of 1872, chapter 864; Laws of 1873, chapter 695; Laws of 1874, chapter 240.

The certificate was dated June 30th, 1882, and was filed and recorded in the office of the secretary of state on July 7th, 1882.

Defendants' counsel offered in evidence the affidavits of Charles B. Hibbard, sworn to September 30th, 1897, and October 5th, 1897, and the affidavit of David Willcox, being the same affidavits as are contained at pages 17 to 29 inclusive.

Same received and read in evidence with same force and effect as if said affiant had testified on the trial to the matters therein contained.

Defendants' counsel thereupon withdrew all exceptions to the ruling of the court on the admission of evidence.

109 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
against
THE ADIRONDACK RAILWAY COMPANY, Appellant. } Stipulation that Case Contains All the Evidence.

It is hereby stipulated and agreed that the foregoing case contains all the evidence taken on the trial of this action; and we do consent that the same be settled and ordered on file as the case on appeal herein.

Dated Albany, N. Y., November 7th, 1898

T. E. HANCOCK,
Attorney General, for Respondents.
LEWIS E. CARR,
Attorney for Appellant.

On the foregoing consent, I do hereby settle the case on appeal as above printed, and do order the same on file as the case on appeal herein.

Dated Albany, N. Y., November 7, 1898.

ALDEN CHESTER,
Justice Supreme Court.

110 Supreme Court, County of Albany.

It is hereby stipulated and agreed that the foregoing papers constitute and are a true copy of the judgment-roll, opinion at special term, notice of exceptions, notice of appeal, and case on appeal herein which has been settled as above printed.

Certification thereof by the clerk is hereby expressly waived.

Dated Albany, N. Y., November 7th, 1898.

ATTORNEY GENERAL,
LEWIS E. CARR,
Attorney for Appellant.

111 At a stated term of the appellate division of the supreme court of the State of New York, held in and for the third judicial department, at the appellate division court room, in the city of Albany, on the 8th day of March, 1899.

Present: Hon. Charles E. Parker, P. J.

" Judson S. Landon, }
" D. Cady Herrick, } JJ.
" Milton H. Merwin, }

THE PEOPLE OF THE STATE OF NEW YORK, }
 Respondent,
 against } Order of Reversal.
 THE ADIRONDACK RAILWAY COMPANY, Im- }
 pleaded, &c., Appellant.

The appeal from the judgment in this action in favor of the plaintiff, rendered November 5th, 1898, and entered in the Albany county clerk's office November 7th, 1898, having been heretofore argued before this court by Lewis E. Carr and R. Burnham Moffat for the appellant, and E. Winslow Paige for the respondent; and due deliberation having been had thereon,

It is ordered, that the judgment appealed from be and the same hereby is in all respects reversed, and that a new trial of this action be and the same hereby is ordered, with costs to abide the event.

Justice Herrick, dissenting.

Justice Putnam, not sitting.

112 Supreme Court, Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK }
 against }
 THE ADIRONDACK RAILWAY COMPANY, Impleaded, &c. }

SIRS: You will take notice that The People of the State of New York appeal to the court of appeals of the State of New York from the order of the appellate division of the supreme court, for the third department, bearing date the 8th day of March, 1899, and hereby stipulate that if the said order be affirmed by the court of appeals, judgment absolute may be taken by the defendant against the plaintiffs.

Dated N. Y., March 16, 1899.

Yours, &c.,

JOHN C. DAVIES,
Attorney General, Attorney for Plaintiffs.

To Lewis E. Carr, Esq., attorney for defendant; clerk of the appellate division supreme court, 3d department, and the clerk of the county of Albany.

113 It is hereby stipulated and agreed that the foregoing papers constitute and are a true copy of the judgment-roll, and all papers upon which the appeal was heard by the appellate division, the order of reversal and the notice of appeal to the court of appeals.

Certification by the clerk is hereby expressly waived.
 Sixteenth of March, 1899.

LEWIS E. CARR,

Attorney for Respondent.

JOHN C. DAVIES,

Attorney General, Plaintiffs' Attorney,

By EDWARD WINSLOW PAIGE,

Of Counsel.

114 Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, }
 Respondents,
 against } Argued Nov. Term,
THE ADIRONDACK RAILWAY COMPANY, Inc. } 1898.
 pleaded, etc., Appellant.

Before Parker, P. J.; Landon, Herrick, & Merwin, associate justices.

The action is one to enjoin the defendant from taking by condemnation proceedings, any part of the lands described in the complaint, for the purpose of its railway, on the ground that it is within the bounds of the "forest preserve" and of the "Adirondack park."

Upon the trial at special term, a judgment was rendered in favor of the plaintiff for the injunction so asked, and from such judgment this appeal is taken.

R. Burnham Moffat and Lewis E. Carr, for appellant.

G. D. B. Hasbrouck and Edward Winslow Paige, for respondents.

PARKER, P. J.:

The defendant had acquired from the State a franchise to build and operate its road through the counties and region which the State subsequently, by the act of 1895, chap. 395, sec. 290, provided might be acquired for the purposes of the "Adirondack park."

115 Under the franchise so acquired, the defendant was proceeding to extend its road through such counties, and to that end, on the 18th day of September, 1897, filed in the several counties in question a map and profile of its proposed route, and at once gave the requisite notice to the owners of the lands through which it passed. Such proposed route has never been changed.

At that time the State had not acquired any interest in the strip of land so located. There is no claim that it had either acquired a conveyance of, or taken any proceedings to condemn such strip prior to that date.

It is said in *R. H. & L. R. R. Co. vs. N. Y., L. E. & W. R. R. Co.*, 44 Hun., 206-210, that when a railroad company has filed the map and given the notice required by the statute, it has thereby "acquired a vested and exclusive right to build, construct and operate a railroad on the line which it has adopted." And again, on page 211, it is said that such railroad company "has a franchise conferred upon it by the legislature to construct its road over the established line."

This case decided that the owner to whom such notice was given, and who had failed to obtain a change of the line, in the method provided by the statute, could not convey the land over which such line passed to a purchaser, or lessee, unaffected by the company's right to complete its title by condemnation, and thereafter to construct its road thereon. This decision was unanimously affirmed by the court of appeals, 110 N. Y., 128, and in that case, on page 133, the following language is used: "This right to locate its line of road, at its election, is delegated to the corporation by the

sovereign power; as is the right subsequently to acquire, *in invitum*, the right of way from the land-owner and any land needed for the operation of its road. * * * When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any land owner or occupant, in our judgment, it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings." See also *Suburban Rapid Transit Co. vs. Mayor, etc., of N. Y.*, 128 N. Y., 510; *Pocantico Water Works vs. Bird*, 130 N. Y., 256.

Upon the authority of these cases, it is clear that, as a purchaser, the State took, under the conveyance to it of the strip of land in question, no title except such as was subject to the right of the defendant to perfect, by condemnation proceedings, its title thereto. At the time the defendant filed its map and gave the notice above stated, the strip described therein was no part of the Adirondack park, nor the forest preserve. Until purchased or condemned, it was no part of such premises; and it never would become a part thereof, unless in the judgment of the proper commission it was deemed necessary for such purpose. When the commission, after concluding that it was necessary, attempted to procure the same, this strip had become impressed with the rights of the defendant, as above specified, and any conveyance which the owner could give, was subjected to that right. So far as the State claims under its deed, it stands simply as a purchaser. It acquires the rights which its grantor had no more; and as purchaser it can claim no more. By making the purchase and taking that conveyance the State was not exercising the right of eminent domain; it was simply acquiring by contract the title which the Indian River Company then had. No other rights than theirs were transferred, and no others were affected by such conveyance. It was upon this theory that a majority of the court concurred in the case of "Adirondack Railway Co. vs. Indian River Co.", 27 App. Div., 326."

Nor did the State acquire any greater interests in the lands by the condemnation proceedings which it claims to have instituted under the provisions of sections three and four of chapter 220 of the Laws of 1897.

Such proceedings were taken against the Indian River Company, only, and the notice required to be given by the fourth section of that act was given to that company only. No notice whatever was given to this defendant. No description of its rights in, or claim to the strip in question was mentioned or referred to in the certificate filed. No actual possession has ever been taken of this strip. Not a thing in the record indicates an intent to acquire or cut off the rights of the defendant in such strip; and the defendant has never

been in a position where, under the provisions of sections 5 and 6 of that act, it could ask damages against the State for any rights of which it has been deprived. The proceeding seems to have been to acquire the rights only which the Indian River Company had in the premises, and by such a proceeding the State has acquired no more than it did by its grant from the same company.

Clearly, under the decisions above cited the defendant had acquired property rights in that strip of land, which neither a conveyance from the owner, nor condemnation proceedings against such owner alone, could operate to cut off.

118 The question is not now presented to us whether the State may, under the exercise of its right of eminent domain, take from this defendant the rights which it has acquired in the strip of land in question, but whether it has as yet actually done so. In our judgment it has not.

When the strip of land in question was located by the appellant it passed through lands which were no part of the forest preserve. Hence no provision of the constitution, nor of any law, was applicable to prevent it, and when it was taken into that preserve, it was taken by the State subject to the rights which the appellant had then already impressed upon it.

We therefore conclude that no reason has been shown why the defendant is not entitled to proceed with the condemnation proceedings it has inaugurated. The judgment restraining it from so doing was erroneous and should be reversed.

Judgment reversed and a new trial granted, with costs to abide the event.

119 Appellate Division, Supreme Court, Third Department.

Parker, P. J.; Landon, Herrick, and Merwin, assoc. jsts.

ALBANY, November, 1898.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, *against* THE ADIRONDACK RAILWAY CO., etc., Appellants. 23-33.

HERRICK, J., dissenting:

I cannot agree to the conclusion arrived at by the court in this case, nor in the reasons therefor contained in the opinion of the presiding justice, and the principles involved are so important that I feel constrained to express my views at some length.

In order to a complete understanding of the case, it seems to me that a somewhat fuller statement of facts is desirable than that contained in the prevailing opinion.

Section 7 of article 7 of the constitution provides as follows: "The lands of the State now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

120 What constitutes the forest preserve is defined by section 270 of chapter 395 of the Laws of 1895.

Section 290 of chapter 395 describes what lands shall constitute Adirondack park, and provides that "such park shall be forever reserved, maintained and cared for as ground open for the free use of the people for their health and pleasure, and as forest lands necessary to the preservation of the head waters of the chief rivers of the State, and a future timber supply; and shall remain part of the forest preserve."

The lands described in the description of what constitutes Adirondack park, embraces lands within the towns and counties theretofore included in the description of the forest preserve.

By chapter 220 of the Laws of 1897, there was constituted "the forest preserve board," whose duty it was made, and they were thereby authorized to acquire for the State by purchase or otherwise, such lands embraced within Adirondack park, as it might deem advisable for the interests of the State, and if they could not agree with the owners upon the value of the property, they were authorized to acquire it by proceedings therein prescribed. After the board had entered upon the discharge of its duties, a corporation known as the Indian River Company, together with a Mr. McEchron and others, offered to sell to such forest preserve board the whole of township No. 15, and 18,000 acres in township No. 32, of the Totten and Cross-Fields patent; which offer was accepted by the forest preserve board on the 6th day of August, 1897.

The lands so agreed to be sold and purchased were within the boundaries, and part of the forest preserve and Adirondack park. It appears that the parties offering to sell to the State did not own all the lands that they had agreed to convey, and while they were

procuring title to the necessary lands in order to convey 121 them to the State, and before the delivery of a deed thereof

to the State, and on the 18th day of September, 1897, the defendant, which is the railroad company, with a road maintained and operated from Saratoga Springs to the village of North Creek, in the county of Warren, and which desired to extend its road from North Creek to Long Lake, caused a map and profiles of its road from North Creek to Long Lake to be made, which map and profiles were duly certified to by the president and *and* engineer, and filed in the offices of the county clerks of the counties of Warren, Essex and Hamilton a portion of the route described in such map and profiles passed over the tract of land known as township 15, and over the land agreed to be sold to and purchased by the forest preserve board, as above set forth.

The defendant thereafter by complaint verified on the 29th day of September, 1897, commenced an action against the Indian River Company, McEchron and the other persons who had agreed to sell such lands to the forest preserve board, asking that they be restrained and enjoined from selling such portion of the lands aforesaid as was comprised within the route adopted by the defendant over said township No. 15, as shown on the map filed by them,

"except said conveyance be expressly made and received subject to the right of way thereover of the plaintiff (defendants') said road."

An injunction was granted restraining said persons from conveying such lands to the forest preserve board.

The order granting such injunction was appealed from to this court, and on or about the 2d day of March, 1898, this court reversed the order granting the injunction, and directed that it be dissolved.

In the meantime, and on the 6th day of October, 1897, the 122 Indian River Company deeded to the State the lands theretofore agreed to be sold to it through the forest preserve board, excepting that portion of those lands described in the map and survey filed by the defendant. On the same day, a deed of the lands described in said survey was drawn up and placed in escrow to be delivered when the injunction should be dissolved.

Upon the 7th day of October, 1897, the forest preserve board caused to be filed in the office of the secretary of state a description of the lands described in the map and profiles filed by the defendants as provided for by section 4 of chapter 220 of the Laws of 1897, and notice thereof was served upon the Indian River Company as the owner of such lands.

The statute provides that "from the time of such service the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified, shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State."

The statute further provides that "claims for the value of the property taken and for damages caused by any such appropriation may be adjusted by the forest preserve board if the amount thereof can be agreed upon with the owners of the land appropriated." * * * "Upon making such agreement the board shall deliver to the owner a certificate stating the amount due to him on account of such appropriation of his lands, and a duplicate of such certificate shall also be delivered to the comptroller. The amount so fixed shall be paid by the treasurer upon the warrant of the comptroller."

Section 5.

123 SECTION 6. "If the forest preserve board is unable to agree with the owner for the value of the property so taken or appropriated, or on the damages resulting therefrom, such owner within two years after the service upon him of the notice of appropriation as above specified, may present to the Court of Claims a claim for the value of such land and for such damages, and the Court of Claims shall have jurisdiction to hear and determine such claim and render judgment thereon. Upon filing in the office of the comptroller a certified copy of the final judgment of the Court of Claims," * * * "the comptroller shall issue his warrant for the full amount due to the claimant, and such amount shall be paid by the treasurer."

On the 11th day of November, 1897, the forest preserve board paid to the Indian River Company the full amount of the pur-

chase-money under their contract for said lands, and upon the dissolution of the injunction, the deed held in escrow of the lands described by said map and profiles was delivered to the People of the State of New York, and thereafter recorded.

In the meantime, and before the payment of said purchase-money, and on the 7th day of October, 1897, the same day the forest preserve board filed its description of lands to be taken, but whether before or after such action is disputed, and it seems to me unnecessary to determine, the defendant began proceedings against the Indian River Company and others, to condemn the lands described in such map and profile, by serving upon one or more of the owners of said lands a petition for the condemnation of said lands, together with a notice of the time and place of its presentation to the court, the People of the State and the forest preserve board not being made parties to such proceedings.

124 Before such condemnation proceedings were terminated the action now under consideration was commenced for an injunction restraining the defendants from proceeding further.

It will thus be seen that before the defendant had filed its map and survey, the State had designated the territory through which such route ran, as a portion of the Adirondack park and forest preserve, and that the State through the forest preserve board had entered into a contract for the purchase of the specific lands in question, and that before proceedings had been commenced by application to the court by the defendant to condemn such land, the State had acquired the title thereto by deeds from the owner thereof, and also by appropriating the same in the manner provided by statute, and it thus became a part of Adirondack park and the forest preserve, which the constitution provides shall be inalienable.

It is contended, however, upon the part of the defendant, and that contention is sustained by Mr. Justice Parker in his opinion, that the defendant, by filing its map and survey, acquired a property or vested right which did not pass by the conveyance to the State or by its appropriation, and that whatever rights the State has acquired are subject to those of the defendant and subject to its right to acquire title to the land covered by such route and survey by condemnation proceedings.

While the State has the right to alter, modify, limit or entirely withdraw the franchise given to the defendant to operate a railroad, I will concede that where under such franchise it has acquired any property or vested right, that such property or vested right cannot be taken away from it, except by awarding compensation.

The mere privilege of acquiring property by the right of eminent domain granted to it by the State is not an absolute right, but one that it holds subordinate to the State, and which power 125 it cannot share with the State, nor be upon an equality with it in its exercise.

When the State elects to exercise the right of eminent domain in its own behalf, it is supreme; all other rights or privileges of a like character theretofore granted by it, must give way to it. It is a right it cannot part with, or bind itself not to exercise; and when

it attempts its exercise, no such question can arise between it and any corporation to whom it has granted the privilege of exercising a like power, as has frequently arisen between corporations, municipal or otherwise, as to who has the prior right. The only limitation upon its exercise that I can conceive of is when the corporation to whom has been granted the exercise of such right, has acquired property pursuant to it, such property cannot be taken away without just compensation; and in that respect it occupies the same position as the individual owner of property, each is under the equal protection of law. But before such corporation has exercised the power conferred upon it, and acquired property pursuant to it, it has no rights or privileges which it can set up as against the State; such power and privileges granted to it are held subordinate to, and subject to the right of the State to exercise this high prerogative at any time in its own behalf. This power is one of the attributes of sovereignty which the legislature cannot grant away or place the State upon an equality of exercise with, or in subordination to, any other corporation or being; it is a power of which it must at all times retain the free and unrestricted use.

This subject was heretofore discussed by me in the case of *The Adirondack Railroad Co. vs. Indian River Railroad Co.*, 27 App. Div., 326, and I will not repeat or enlarge upon that discussion here.

It is contended, however, that before the State had acquired 126 any title or interest in these lands, that the rights of the defendant had become absolute and fixed by filing its map and plans, and the cases of *R. H. & L. R. R. Co. vs. N. Y., L. E. & W. R. R. Co.*, 110 N. Y., 128; *The S. R. T. Co. vs. Mayor*, 128 N. Y., 510; and *P. W. W. Co. vs. Bird et al.*, 130 N. Y., 256, are relied upon to sustain that contention.

It will be observed that none of those cases are cases where the State was a party; none of them are cases where the land-owner was a party; they were all cases between contending corporations upon whom had been conferred the power of eminent domain, and the real question decided was, that the corporation first filing its map and survey acquired as against the others an exclusive right to the use of such land for corporation purposes; that was all that was decided in any of those cases, and in none of them was it necessary to decide, nor was it decided, that by so filing the map and survey the corporation acquired any interest in or title to the land described therein.

The judges writing the opinions in those cases, as frequently occurs, used language and expressed opinions not necessary for a decision of the questions involved, which leads to some embarrassment; for instance, in the case of *The R. H. & L. R. R. Co. vs. N. Y., L. E. & W. R. R. Co.*, 44 Hun., 206-210, the judge said "that by filing its map and plans, and giving notice the corporation acquired a vested and exclusive right to build, construct and operate a railroad on the line which it has adopted." And again in the same case upon appeal, in the court of appeals, 110 N. Y., on page 133, the judge writing the opinion said: "This right to locate its line or

road, at its election, is delegated to the corporation by the sovereign power; as is the right subsequently to acquire, *in invitum*, 127 the right of way from the land-owner, and any land needed for the operation of its road."

* * * * "When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any land-owner or occupant, in our judgment, it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations, and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings."

Of course if the language used in the several opinions in the cases referred to is to be taken literally, all discussion of this question is ended; and it must be considered as established law, that the legislature has power to confer upon a corporation the right to take from a man without notice, and without compensation, the most valuable element of his property, his right to freely dispose of it. That a corporation can of its own motion, without application to the courts, absolutely forbid the sale or disposition of a man's property. Can for an indefinite period of time tie it up in his hands, and compel him to hold it until such corporation gets ready to take possession of it upon the payment of such an amount as it chooses to offer, or third parties, (commissioners) say shall be paid for it, or transfer it subject to the same burden. Can place an incumbrance upon it that depreciates it in value, that prevents its free sale. That when

128 he has agreed upon its sale, and the sale of the whole of it, and all interest in it, can by its own absolute fiat, by merely filing a statement of what it wants, absolutely prohibit its sale.

All this is so contrary to fundamental principles, repeatedly recognized by the court of appeals, that I refuse to believe that it intended to so decide.

As a general rule the court only passes upon what is necessary in order to decide the case before it.

It will be observed that the language of the opinions, in the cases referred to, goes much further than was necessary for the decisions of those cases.

Take the case of *The R. H. & L. R. R. Co. vs. N. Y., L. E. & W. R. R. Co. (supra)* as an illustration. The only parties before the court were the two railroad corporations, the only question necessary to be decided was, which had precedence. It was not necessary to determine that no one else could interfere with the rights or proceedings of the corporation which had filed its map and survey, nor was it necessary to determine that it had an absolute right to construct and operate a railroad upon the line described in such map and survey, nor that it had acquired a lien as against any other person or corporation than the competing corporation, which had subsequently filed its map and survey.

Neither the State, nor the owners of property were before the court in any of those cases. Neither had an opportunity to be heard. The rights of neither were considered. And the opinions were written evidently without considering how their language might affect the rights of the State or property-owners.

In determining the force and effect to be given to the language of an opinion, we should bear in mind what was said by the court in the case of *The C. C. T. Co. vs. K. R. R. Co.*, 154 N. Y., 493, 129. "If as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, *that* are the dicta of the writer of the opinion, and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance."

The question before the court in those cases was not the general question as to what rights had been acquired by the corporations filing maps and surveys of the lands they desired to appropriate, but simply what rights they had acquired as against other corporations, to whom had been granted similar powers.

The questions to be decided in this case, however, are questions arising between the defendant and the State, and between the defendant and the owners of the lands described in the defendant's map and profile, not questions between the defendant and any other corporation. We are called upon to determine whether the defendant had acquired any such interest in such lands as against the owners, as would prevent their conveying them free and clear of all liens or encumbrances.

It becomes necessary then to discuss whether by filing its map and survey the defendant acquired any vested or property right in or to the lands in question.

If it obtained any interest in or to the lands in question, it must have been from, or in derogation of the rights or interest of the former owner.

It had not acquired title to the land or a right to the possession thereof; these could only be acquired after it had taken proceedings to condemn the land, and had paid the owner for it (Code of Civil

Proc., sections 3371 and 3373). As between the land owner 130 and the corporation, no rights had become fixed or vested.

The rights of the respective parties, that is, the land-owner and the railroad company, do not become fixed until they have progressed so far as to give mutual rights, that is, until the confirmation of the report, when the land-owner becomes entitled to the compensation or damages fixed by the commissioners in their report, and the railroad company becomes entitled to the land upon the payment of such compensation or damages.

Matter of Rhinebeck & Conn. R. R. Co., 67 N. Y., 242.

Corporation of City of New York vs. Mapes, 6 John. Chan., 49.

Corporation of City of New York, 18 Johnson, 506.

Until that time no rights are vested in either party.

In the cases of Corporation of City of New York, 18 Johnson, 506, and Corporation of City of New York *vs.* Mapes, 6 John Chan., 49, it was held that no rights became vested before the appointment of commissioners to appraise the damages, but those cases left it open to be inferred that the rights of the parties became vested upon the appointment of such commissioners. Subsequently, in the case of The People *vs.* Brooklyn, 1 Wend., 319, the court upon reviewing those and other cases, held that the rights of the parties did not become fixed and vested until the confirmation of the report of such commissioners, that up to the time the report was made, the party seeking to condemn could not know the amount that they would have to pay for the land, and, therefore, could not tell whether they would wish to proceed, and that up to that time

131 the court had the right to permit them to discontinue, but after the report had been confirmed, then for the first time the rights of the parties became fixed and vested. See also the same effect in the Matter of Canal Street, 11 Wend., 154, and Matter of Anthony Street, 20 Wend., 620.

In the Matter of Commissioners of Washington Park, 56 N. Y., 144, where the park commissioners had caused a map of the lands to be taken to be filed, had passed resolutions that it was necessary to take such lands; commissioners of appraisal had been appointed, hearings had been had, the commissioners had made and were ready to file the report, when the park commissioners obtained an order staying the filing of the report, and staying the owners from taking any proceedings.

Subsequently, leave to discontinue was granted upon payment by the park commissioners to the land-owners, the parties to the proceedings, of their necessary and reasonable costs and expenses incurred upon the appraisement of damages. This order permitting them to discontinue was sustained by the court of appeals upon the ground that neither party had acquired any vested rights, that until the report of the appraisers was confirmed, the board of commissioners of Washington park had not acquired any title to the property, and no rights for compensation had become vested in the property-owners.

This case was approved in the Matter of Military Parade Ground, 60 N. Y., 319, where it was held that no title to lands was acquired simply by making and filing a map, plan or survey, under an act which conferred upon the department of public works, the rights to lay out and establish a parade ground, and which provided that the department of public works should cause a map to be made, showing the locality and the extent of the same, and certified by them, which was to be filed as directed; and from and after 132 the filing of such map, the ground so described should become one of the public squares or places, and public streets and avenues in the city; and provides in another part for the appointment of appraisers to assess the damages; and it was held that until the confirmation of the report of the commissioners of estimate and assessment appointed to make such assessments, the title to the

lands did not pass to the city, but remained in the owners with full power to exercise entire control over it, subject only to the right of the city to acquire title according to law. And that independent of the statute which authorized the park commissioners to discontinue proceedings, that under the authority of the case of the " Commissioners of Washington Park" (*supra*), the court had power to permit them to discontinue at any time before the confirmation of the report of the commissioners of estimate and assessment.

If the defendant, then, had neither the title nor the right to the possession of the land, what interest did it have in it? If it had acquired by merely filing the map and survey some interest in it, which the owner could not thereafter convey away, then it acquired that interest without notice and without compensating or providing for compensating the owner.

If it was a property right in the land, then the owner could not be arbitrarily deprived of it without adequate compensation.

The mere filing of the map and profile or survey, which is done without notice to any one, did not constitute a lien or encumbrance upon the land as against the owner; to hold that it did would be in contravention of that principle which forbids that a man shall be deprived of any of his rights without an opportunity to be heard.

It would be taking private property without compensation.

133 One of the most valuable attributes of property is the right to freely sell it. Any lien upon it is a restraint upon its sale, a cloud and encumbrance upon it, which necessarily interferes with its sale; it is a depreciation of some of its value.

"Salability is an essential element of property, and the destruction or diminution thereof is a taking of property that cannot be done except through the exercise of the right of eminent domain or of the police power."

Ingersoll *vs.* Nassau Electric R. R. Co., 157 N. Y., 453-63.

"The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only by the law of the land."

First Blackstone's *Commentaries*, 138.

"Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the constitution, that it must, in terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner."

Forster *vs.* Scott, 136 N. Y., 577-585.

In the case last cited the court held that portion of a statute which declared that no compensation should be allowed to 134 the owner of land taken for a street, for any building erected thereon after the filing of a map of the proposed street, to be unconstitutional, as taking property without compensation.

To the same effect is the case of German Am. Real Estate Co. vs. Myers, 32 App. Div., 41.

To hold that the defendant by merely filing its map and profiles procured a lien and placed an encumbrance upon the land would be to hold that an owner can be deprived of the free use and enjoyment of his property, and of his right to freely sell and alienate it without due process of law, without notice or an opportunity to be heard.

An opportunity to the citizen to test before the proper branch of our Government the legality of the taking of his property, is and must ever remain a necessary part of that "due process of law" guaranteed him by the constitution. As was said by Jackson, C. J., in *Scott vs. City of Toledo*, 36 Fed. Rep., 397 (1888): "The owner must in some form, in some tribunal or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened * * * in order to constitute such procedure 'due process of law.'"

And the same principle is recognized and stated in—

People vs. Supervisors, 70 N. Y., 234 (1877).

Stuart vs. Palmer, 74 N. Y., 183 (1878).

People vs. Turner, 117 N. Y., 236 (1889).

Spencer vs. Merchant, 125 U. S., 356 (1887).

Davidson vs. New Orleans, 96 U. S., 104 (1877).

Kentucky Railroad Tax Cases, 115 U. S., 331 (1885).

135 Under the statute in this case, the owner may or may not have an opportunity to be heard. The statute does not require notice to be given to the owner of the property. It requires notice to be given only to the occupant.

Section 6 of chapter 565 of the Laws of 1890.

If within fifteen days after the filing of the map the owner acquires knowledge of its filing, he may apply to a justice of the supreme court to have the route altered, that is, to have this lien upon his land removed. It will thus be observed, that he has no opportunity to be heard upon the question as to whether a lien shall be placed upon his land, but an opportunity only to take steps to have it removed.

All the rights that the defendant has are under the statute and section referred to, and it is not sufficient that in a particular case the owner, as a matter of fact has notice served upon him, the statute does not require such notice, and if it is a valid statute, this lien can be acquired without serving any notice upon the owner at all, and without the owner ever having received any notice or knowledge of the proceeding until after, under the statute, it is too

late for him to take any proceeding to remove the lien by changing the route.

And it is familiar law that a statute is to be tested not by what has been done under it, but by what may by its authority be done.

A lien upon real estate under which an owner may ultimately be deprived of his property therein, cannot be obtained without notice to such owner.

In the case of *Stuart vs. Palmer*, 74 N. Y., 183, which was the case of an assessment for a public improvement, and which assessment when made was declared by the statute to be a lien upon the land so assessed, and where the statute made no provision 136 for notice to be given, the court said, "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

This case has been repeatedly approved of by the court of appeals, and is now perhaps the leading authority in this State upon the principle involved.

The statute in this case not having required notice of the filing of the map and profile to be given to the owner of the land, no lien or encumbrance could be validly imposed upon it by authority of its provisions, and it follows therefore that the defendant did not by filing its map and profile obtain any property right or interest in the land as against the owner, which would prevent such owner from conveying it free and clear to the State.

It is claimed, however, that by virtue of its franchise, the defendant has obtained a vested right to build a road over the right of way which cannot be taken away from it.

The error in that assumption arises, it seems to me, from a failure to appreciate what its franchise means, and what is granted by it.

Its franchise, as such, is simply the privilege to exist as a corporation: a privilege granted to individuals to act together as one, with the right of successions: together with the powers 137 granted to enable such body to carry into effect the purposes of the organization, and the property it acquires by virtue of such privilege is separate and distinct from the privilege of franchise itself.

In this State individuals cannot of common right combine together to build and operate a railroad, to do so is a privilege granted by the State.

And by making and filing its articles of incorporation under the statute, the corporation so formed, obtains no property or vested right, except the mere right to exercise corporate functions, the right to existence as a corporation.

It has thereby obtained no right, upon its own motion, to appropriate lands, or an interest in them. The courts have repeatedly held that by the general railroad law, the legislature has not delegated to railroad corporations the power of determining what lands are necessary to be appropriated to their use for the purposes of their incorporation, but that under the statute it is for the courts to determine upon the application of a railroad company the question of the necessity and extent of the appropriation.

See *R. & S. R. R. Co. vs. Davis*, 43 N. Y., 137;

R. & S. R. R. Co. vs. Davis, 55 N. Y., 145;

Matter of N. Y. C. R. R. Co., 66 N. Y., 407.

They are simply given the power to acquire lands by purchase, or, in the event of failing to agree with the land-owners, to acquire them under the right of eminent domain by application to the courts.

While a railroad corporation is formed for the declared purpose of building a railroad through a specified portion of the State, no right is conferred upon it to do so; what is given to it, is not the right to build its road through such portion of the State, but 138 the capacity to acquire the right from those owning the land over which such route proceeds.

This was well stated by Chief Justice Ruger in the case of *The People vs. O'Brien*, 111 N. Y., 1-30. In that case the corporation was a street railroad company organized under chapter 252 of the Laws of 1884, which provides for the incorporation of street surface railroads, and requires amongst other things, that the articles of association shall state the names of the cities, towns and villages, and the counties, together with the names of and descriptions of the streets, avenues and highways through which it is proposed to construct the road, and the chief justice in his opinion states, "By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct and operate a railroad upon the streets of any municipality. This right, under the constitution, could be acquired only from the city authorities, who could grant or refuse it at their pleasure."

So in the case of the defendant by its articles of association, while they described the localities through which it proposed to build the road, it acquired no present authority or right to construct the road through such localities, but merely the power or capacity to acquire the right from the owner or owners of the soil; as in the case of the street railroad company, it had to acquire that right from the municipal authorities who owned the streets through which it proposed to construct its route, and until it acquired such right, it acquired no property in such route.

139 The constitution equally protects the municipality in its streets, and the land-owner in his property. And in the event of the railroad corporation failing to obtain the consent of

either to its use, application may be made to the courts to obtain the necessary rights, and when so obtained they become property.

The fact that by being authorized to build a railroad, between prescribed points in the State, and to file a map of its proposed route, and by so doing, such road acquires no title to or property in the land so described in such map even as against the State which conferred the right to build its road over such course, is illustrated by the case of *The N. Y. C. & H. R. R. Co. vs. Aldridge*, 133 N. Y., 83.

The Hudson River R. R. Co. was incorporated under chapter 216 of the Laws of 1846 for the purpose of constructing a railroad along the east side of the Hudson river from New York to Albany; subsequently, it was consolidated with the New York Central R. R. Co. By chapter 30 of the Laws of 1848, the legislature amended the act of 1846, and by section 5 of such amendment it gave power to the directors of the railroad company to alter the location of their road, and adopt a new one in its place, as a substitute for the old location; a map of the course as altered was to be filed in accordance with the provisions of that section.

In 1868, the company under the amendment of 1848 modified its location and altered its line and filed a map thereof as provided by law; subsequently, it made additional alterations and modifications, and made a map thereof. By virtue of these statutes and by the filing of its maps indicating the course upon which it intended to

140 lay out and operate its road, it claimed to have obtained title to certain lands under the waters of the Hudson river. The court held that neither by the acts of the legislature, nor by filing its maps did the railroad obtain any title to the land in question. "The land was to be acquired subsequently. As to lands belonging to individuals the company secured no title by selecting and adopting a course and filing a map, it still had to purchase such lands or else obtain them by the exercise of the right of eminent domain, there is no provision in the law which makes a different result where the lands belong to the State."

In the case of *Archibald vs. N. Y. C. & H. R. R. Co.*, 157 N. Y., 574, where the same railroad company, under the same statute, had filed its map and proceeded to fill in a parcel of land under water, and thus reclaimed the land in controversy, the court held that it had acquired no title to the land in that way, or by indicating the parcel upon the map, and that "the railroad company could not acquire title to the land under water by taking possession of it and filling it up. The title still remained in the State, and the grant from the sovereign to the owner of the adjoining upland would carry title to him."

It will be observed that that case is in many respects a much stronger one in favor of the railroad company than the one at bar. There, pursuant to its charter and the act of the legislature, it had filed its map of its proposed route, running over lands of the State under water; it had filled in such lands; had expended money and labor in creating, so to speak, the tract of land in question, and yet it was held that the State, as the owner of the title, could convey such

lands to an individual and that such individual acquired a title thereby superior to that of the railroad, and could maintain an action against it to recover the possession thereof, and eject the railroad therefrom, and the only reason that the defendant was 141 not actually ejected but permitted to occupy it in common with the plaintiff, was, that during the pendency of the action it had procured the title of the plaintiff's cojoint tenants in such land.

If under such circumstances the State can convey title to land, upon which it has at least given the railroad company a license to enter and use, with the power to acquire title to it, how much stronger is the right of an individual property-owner to convey his property, which has been described in the map, upon which no money has been expended, and as to which he has granted to the railroad company no rights of any kind whatever. If the State in the one case can give title free and clear to its grantee, notwithstanding the laying out of the route and filing a map by its permission, and the expenditure of its money pursuant to such permission, why should not an individual owner exercise the same power and authority over his land? If no property right has been acquired in the one case, none has been acquired in the other. The utmost that has been acquired is the right to obtain property.

There is a plain distinction between the franchise to be a corporation, and the property acquired under such franchise. One can be altered, taken away or destroyed, the latter cannot be without compensation.

The case of *The People vs. O'Brien (supra)*, which is the leading and strongest authority in this State upholding the sacredness and inviolability of corporate property rights, recognizes this distinction; while it held that it was not within the power of the legislature to destroy the property rights of a corporation acquired under its franchise, it was not questioned that the legislature could destroy the existence of the corporation itself.

Schurz vs. Cook, 148 U. S., 410.

142 The mere privilege to act as a corporation, the so called franchise, lacks one of the essential elements of property, it cannot be sold or alienated, except by express provision of some statute; at common law, it is not transferable, nor can it be sold upon execution.

Thompson on Corporations, sections 5352, 5353.
Morawitz on Private Corporations, section 924.

I repeat that all that the defendant acquired by its articles of association or incorporation was the power or capacity to acquire the right from the people owning the land to construct its road over such land, and that such power or capacity was not property or a vested right, but merely the privilege to acquire property or vested rights, and that this capacity or power so conferred upon it is not in and of itself property; if it was it could not be taken away without compensation, and the courts have uniformly held that such

power can be taken away from it without compensation, although the property that it has acquired pursuant to such power cannot be.

In the case of *Pearsall vs. Great N. R. R. Co.*, 161 U. S., 646, the court cited with approval Mr. Justice Cooley's definition of vested rights, that is, that "rights are vested in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting."

Cooley's *Principles of Const. Law*, 332.

143 Accordingly, it was held in that case "That a clause in a charter of a railroad corporation granting it certain powers to consolidate with or become the owner of other railroads was not such a vested right that it could not be rendered inoperative by a subsequent statute passed before the company had availed itself of this power granted by a former statute."

This was approved in *Bank of Galveston vs. Tennessee*, 163 U. S., 416, and *Galveston Railroad Co. vs. Texas*, 170 U. S., 226, and I can see no distinction between the principle of those cases and of one where a railroad has the privilege to extend its route by the purchase or condemnation of lands, as long as it has not exercised that privilege and acquired the land.

The filing of the map under the definition above given of a vested right, could not create a vested right. As was said in *Forster vs. Scott (supra)*, the corporation "might or might not appropriate the land according to their pleasure, notwithstanding the filing of the map;" or the court might or might — hold it to be necessary for the defendant's purposes.

In this case the land in question had not been acquired either by executed contracts or by condemnation proceedings; nothing had been acquired from the owners; nothing had been taken away from them that pertained to their title or ownership; the most that can be said is, that the defendant had taken the first steps in proceedings which might or might not, continued to the end, result in acquiring property. It was a right which could only come into existence on an event or condition which might not happen or be performed, until some other event might prevent its vesting; and the defendant, as was said in *People vs. O'Brien (supra)*, had "no present

144 authority to construct and operate a railroad over the land in question; before it could do so it had to condemn it and pay for it, and therefore under the definition above given, as to what constitutes a vested right, the defendant had only a contingent interest, not a vested right, and such an interest is not property, and is not within the protection of the Constitution."

There are some cases holding that any act or proceeding which prevents the corporation from fulfilling the purpose for which it

was formed, is practically a destruction of that corporation and its franchise, and therefore a taking of a right or thing of value. This, however, is not such a case. The defendant is not prevented from exercising its powers under its franchises, by having its entire route taken away from it, and thus being unable to do that which it was organized to do, because it appears that the corporation is already owning and operating a road, and this proposed route is merely an extension of one already in existence; and if it does not obtain the route in question, it will still be an existing and operating road as it has been for a number of years.

In that respect it is like the case of *Pearsall vs. Great N. R. R. Co.* (*supra*), which had the right to extend its route by consolidating with, leasing or purchasing other roads, which right as we have seen, the court held not to be property or vested right, and therefore it could be taken away from it prior to its becoming possessed of such other roads by consolidation, lease or purchase.

Nor does it appear that the route in question is necessary to connect with any other portion of the road already constructed, nor that it is a necessary route to make a through line; that is, it does not appear that some other route may not be adopted which will answer the same purpose, therefore the interfering with it or 145 preventing its taking such route, is not a practical destruction of its corporate franchise.

I refrain from discussing the question raised as to the constitutionality of the provisions of the statute providing for the taking of lands by the forest preserve board, for the reason that when the State entered into the contract to purchase, the defendant had no property right in the premises neither had it when the purchase was completed or the appropriation made, so that as to it, no constitutional question can arise as to taking property without notice or hearing, and that question therefore cannot be raised by it.

One whose rights are not affected by the constitutionality of a law, cannot raise that question.

At the time the defendant instituted its proceedings to condemn the premises in question, it knew of the action of the State, and therefore could take nothing by such proceedings.

If I am right in my conclusion that the defendant acquired no interest in the land as against the land-owner that would prevent his conveying it to the State free and clear of any lien or encumbrance, then such land became at once subject to the provisions of section 7, article 7, of the constitution, and there is no occasion to consider the effect of its filing a description of the lands to be taken as provided for by section 4 of chapter 220 of the Laws of 1897. If it by any means, whether by purchase or condemnation, acquired the land in question for public purposes, they cannot, nor can any intent in them, be taken away from it.

The judgment should therefore be affirmed.

146 Whereupon the court of appeals, having heard this cause argued by Edward Winslow Paige, Esq., of counsel for the appellant, and Lewis E. Carr, Esq., and R. Burnham Moffat, Esq.

of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of said appellate division should be reversed and the judgment entered upon the decision of the special term affirmed, with costs.

Therefore it is considered that the said order be in all things affirmed, with costs, as aforesaid, and stand in full force, strength, and effect.

Thereupon the following opinion of the court was handed down herein:

147 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, }
v.
THE ADIRONDACK RAILWAY COMPANY, Respondent, Impleaded }
with the Indian River Company *et al.*

(Decided October 3, 1899.)

Appeal from an order of the appellate division of the supreme court in the third judicial department reversing a judgment in favor of the plaintiff entered upon the decision of the court at special term.

Edward Winslow Paige, for appellant.

Lewis E. Carr and R. Burnham Moffat, for respondent.

VANNU, J.:

In 1882 the Adirondack Railway Company was incorporated for the term of one thousand years to construct and operate a railroad from Saratoga Springs to the River St. Lawrence, near the city of Ogdensburg. It was a reorganization of an older corporation known as the Adirondack Company, which was organized in 1863, under the provisions of chapter 236 of the laws of that year. Prior to the foreclosure which resulted in the reorganization, the Adirondack Company had constructed a railroad from Saratoga Springs to North Creek, in the county of Warren, and this railroad, together with the right to extend the same, became the property of the Adirondack Railway Company, which, in April, 1892, applied to the railroad commissioners for a certificate, under chapter 565 of the Laws of 1890, to relieve it from the ~~statutory~~ obligation of extending its lines; on the 9th of May following, the commissioners issued their certificate accordingly. The Adirondack Railway Company, thenceforth called the defendant, made no attempt to extend its road until the early part of 1897, when a survey was made for a proposed extension from North Creek through the counties of Warren, Hamilton and Essex, to the outlet of Long lake in Hamilton county, where it was expected that, by connecting with other roads, a route would be secured to the St. Lawrence river. Before anything further was done to extend the road, certain action, taken by the State, should be briefly alluded to.

In 1885 the forest preserve was created by statute, embracing "all the lands now owned, or which may be hereafter acquired by the State of New York within" certain counties, and the area was ex-

tended by subsequent legislation. (L. 1885, ch. 283; L. 1887, ch. 639; L. 1893, ch. 332.) These acts required said lands to be forever kept as wild forest lands, and provided that they should not be sold, leased or taken by any corporation, public or private. A forest commission with appropriate powers was created to care for the forest preserve, and appropriations were made from time to time to enable it to properly discharge its duties.

In 1890 the forest commission was authorized to "purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a State park," and in 148 1892 the Adirondack park was established and placed under the control of said commission. (L. 1890, ch. 37; L. 1892, ch. 707.)

The revised constitution, which went into effect on the 1st of January, 1895, provides that "the lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed." (Const., art. 7, § 7.)

In 1895, the legislation relating to the forest preserve and the Adirondack park was extended by the fisheries, game and forest law, and it was declared by section 290 that "such park shall be forever reserved, maintained and cared for as ground open for the free use of all the people for their health and pleasure and as forest lands necessary to the preservation of the headwaters of the chief rivers of the State, and a future timber supply; and shall remain part of the forest preserve." (L. 1895, ch. 395, §§ 270, 295.) During the same year the forest commission was authorized to purchase 80,000 acres for the use of the Adirondack park. (L. 1895, ch. 561.) In 1897 an act was passed, the object of which, according to its title, was "to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor." (L. 1897, ch. 220.) By this act the appointment of a forest preserve board was authorized, and it was made its duty "to acquire for the State, by purchase or otherwise, land, structures or waters, or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game and forest law, as it may deem advisable for the interests of the State." Section 3 of said act provides that "the forest preserve board may enter on and take possession of any land, structures and waters in the territory embraced in the Adirondack park, the appropriation of which in its judgment shall be necessary for the purposes specified in section 290 of the fisheries, game and forest law, and in section 7 of article 7 of the constitution." It is provided by the next section that "upon the request of the forest preserve board an accurate description of such lands so to be appropriated shall be made by the State engineer and surveyor, or the superintendent of the State land survey, and certified by him to be correct, and such board or a majority thereof shall indorse on such description a certificate stating that the lands described therein have been appropriated

by the State for the purpose of making them a part of the Adirondack park; and such description and certificate shall be filed in the office of the secretary of state. The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description, and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry upon and appropriation by the

State of the real property described in such notice for the 149 uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State. (§ 4.) Provision is made by the next section for the payment for lands so taken and for damages resulting from the appropriation by agreement with the owner and the delivery of a certificate payable by the State treasurer upon the warrant of the comptroller. (§ 5.) If the forest preserve board is unable to agree with the owner upon the value of the property appropriated, the owner, within two years after the service upon him of the notice of appropriation, may present a claim for the value of the land to the Court of Claims, which has jurisdiction to hear and determine the same and to render judgment thereon. The amount of the final judgment is payable to the treasurer upon the warrant of the comptroller. (§ 6.) No provision is made by the act for the payment of any lien upon the lands except that when a judgment for damages is rendered and it appears that there is a lien or incumbrance upon the property appropriated, the amount thereof shall be stated in the judgment and the comptroller may deposit the amount awarded in the proper bank to be paid and distributed to the persons entitled to the same as directed by the judgment. (§ 19.) The sum of \$600,000 was appropriated for the purposes specified in the act, and the comptroller was authorized to borrow \$400,000 more upon the request of the forest preserve board to be expended under its direction.

On the 6th of August, 1897, after certain negotiations with the owners of a part of an extensive tract of land known as the Totten & Crossfield purchase, the forest preserve board passed a resolution accepting the offer of the owners of about 18,000 acres of township 23, and 32,000 acres of township 15 of that purchase for the sum of \$149,000, of which \$99,000 was for the land and \$50,000 was for certain improvements at Indian lake for the use of the State, to be made in accordance with the plans and specifications to be furnished by the State engineer. Township 15 of the Totten & Crossfield purchase lies, as is admitted in the answer, "wholly within the bounds of the forest preserve and also of the Adirondack park." Upon the 15th of August, 1897, a representative of the State engineer with a surveying party began surveying at Indian lake for the purpose of constructing a dam at its mouth in order to stow water for the use of the Champlain canal and for water power on the Hudson river. Upon the completion of the survey plans and speci-

fications were prepared and the construction of the dam was commenced.

September 18th, 1897, the defendant caused a map and profile to be filed in the counties of Hamilton, Warren and Essex for the extension of its road across township 15, which the forest preserve board had agreed to purchase as aforesaid, and which lies partly in each of said three counties. It also gave notice of such filing to the occupants as required by statute, 150 but did nothing else. About the 1st of October following, as the owners were about to convey to the State the lands covered by the resolution of August 6th, and receive their money, they were restrained from so doing by an injunction issued in an action brought by the Adirondack Railway Company against them. Thereupon they placed the deed *in escrow* to be delivered when the injunction was dissolved, made another deed embracing the same premises, except the land described in the railroad survey, delivered it to the forest preserve board, and received the \$99,000, according to agreement. Immediate steps were taken to vacate the injunction, but they were not at first successful, and on the 7th of October the forest preserve board met, and learning that the justice who granted the injunction had declined to vacate it, they took steps to appropriate the land in question for a park under the power of eminent domain. The State engineer having furnished a description in writing of the six-rod strip, which the defendant desires for a railroad, and certified that the same was correct, the three members of the forest preserve board, acting under chapter 220 of the Laws of 1897, annexed thereto a certificate of condemnation and signed the same as the forest preserve board, in these words: "State of New York, county of Albany, city of Albany, ss. We, Timothy L. Woodruff, Charles H. Babcock and Campbell W. Adams, being the forest preserve board, acting under and in pursuance to an act of the legislature of the State of New York, being chapter 220 of the Laws of 1897, entitled 'An act to provide for the acquisition of land in the territory embraced in the Adirondack park and making an appropriation therefor,' do hereby certify that the lands in township 15, Totten & Crossfield purchase, in the counties of Hamilton, Essex and Warren, of the State of New York, described in the foregoing certificate of the State engineer, have been and hereby are duly appropriated by the State of New York for the purpose of making them a part of the Adirondack park." These papers, indorsed "State engineer's certificate and description and forest preserve board's certificate of condemnation," were filed in the office of the secretary of state on the 7th of October, 1897. On the same day a notice of this action of the board, with a general description of the property appropriated and a copy of the papers above mentioned, were served on William McEchron, the president of the Indian River Company, which then owned the lands involved. This service was made, as the special term is presumed to have found, at ten minutes before noon. On the same day the defendant began proceedings to condemn said strip for the purpose of extending its railroad, but as the special term is also presumed to have found, they did not file the

lis pendens until afternoon, and hence not until after the aforesaid proceeding in behalf of the State had been completed. No notice of condemnation was served on the defendant.

On the 2nd of March, 1898, the injunction restraining the conveyance of said lands to the State was reversed on appeal by the appellate division, and thereupon the original deed *in escrow* 151 was delivered and recorded. The defendant went on with its condemnation proceedings until it was restrained by a temporary injunction granted in this action, which was brought to restrain that company and the other defendants from further continuing the proceedings to condemn.

The defendant alone answered, and after a trial the special term rendered judgment for the People, perpetually enjoining it from taking the land. Upon appeal the judgment was reversed by the appellate division and a new trial ordered, by a divided vote, upon the ground that the company, by the filing of its map on the 18th of September, had impressed upon the land a lien that was good as against the State of New York. The People have appealed to this court, giving the usual stipulation for judgment absolute.

From the form of the decision of the special term, which did not separately state the facts found, and of the appellate division, which did not state that the judgment was reversed upon a question of fact, it must be presumed that all the facts warranted by the evidence and necessary to support the judgment were found by the special term, and that the reversal by the appellate division was based wholly upon errors of law, the facts standing approved by that court (*Petrie v. Hamilton College*, 158 N. Y., 458, 463; *Code Civ. Pro.*, §§ 1022, 1338). For the purpose of this appeal, therefore, we must assume that the condemnation proceedings instituted by the forest preserve board were fully completed, as required by the statute of 1897, before proceedings to condemn on its part were commenced by the defendant. Hence, if the condemnation act of 1897, under which the forest preserve board acted, is in all respects a valid and binding law, title to the strip of land in question passed to the State before the defendant began the proceedings sought to be restrained in this action. The moment the title passed, said land became a part of the forest preserve, and thereupon the constitution spoke and commanded that it should not "be taken by any corporation, public or private" (art. 7, § 7). If the State, at any time and by any method, became the lawful owner, whether legal or equitable, of the land in question, *eo instanti*, this general and sweeping command of the fundamental law was addressed to the defendant, and rendered unlawful every effort at condemnation of that land on its part. Whether the State became the equitable owner through contract, possession and performance, we shall not discuss, as we think it became the legal owner through the power of eminent domain.

The defendant does not attack the regularity of procedure on the part of the State, but contends that the act, under which the State proceeded, is void, because it violates both the Federal and State constitutions. Its more specific contention is that said act is unconstitutional, because it authorizes the seizure by the State of private

property without due process of law, and without making compensation therefor.

Due process of law, sometimes called the law of the land, is not defined by either constitution, or by any statute, and 152 judges of the highest standing and widest experience, in various jurisdictions, have pronounced it incapable of definition, so exact as to fit all cases, and attempts to define have usually been confined to the facts of the case in hand. (*Bertholf v. O'Reilly*, 74 N. Y., 509, 519; *Davidson v. New Orleans*, 96 U. S., 97, 104.) While to a reasonable extent it may be regulated by a statute, ordinarily it rests upon established custom, and a method of procedure having the sanction of settled usage is commonly regarded as due process of law. It does not necessarily mean a judicial proceeding, for a man may be lawfully deprived of his property through the power of taxation, or of the use of his property through the police power without the intervention of any court. (*MacMillan v. Anderson*, 95 U. S., 37, 41.) In many cases due process of law is wanting when there is no opportunity for the person whose rights are affected to be heard, but this does not apply to the taking of private property by the State for public use through the power of eminent domain, except as to the subject of compensation, unless some statute requires a hearing. (Cooley's *Const. Lim.*, 356.)

The power of taxation, the police power and the power of eminent domain, underlie the Constitution and rest upon necessity, because there can be no effective government without them. They are not conferred by the Constitution, but exist because the State exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the State as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it as a necessary attribute of sovereignty. They belong to the State because it is sovereign, and they are a necessity of government. The State cannot surrender them, because it cannot surrender a sovereign power. It cannot be a State without them. They are as enduring and indestructible as the State itself. (Black *Cons. Law*, § 123; Cooley *Const. Lim.*, 524; *Eminent Domain* by Randolph, 77; Lewis, § 3; Mills, § 11.) Each is a peculiar power, wholly independent of the others, and not one of them requires the intervention of a court for effective action by the State. In the case of eminent domain, when the State is not itself an actor, compensation for property taken, unless the amount is agreed upon, can be ascertained only through the aid of a court, but otherwise judicial action is unnecessary except as provided by statute. (State *Const.*, art. 1, § 7.) The power of eminent domain is the right of the State, as sovereign, to take private property for public use upon making just compensation. The State has all the power of eminent domain there is and all that any sovereign has, subject to the limitations of the Constitution. Although exercised under our first Constitution, it is not mentioned therein, and it is now mentioned only for the purpose of limitation. The language of the revised Constitution is as follows: "No person * * * shall be deprived of life, liberty or property without due process of law; nor shall private

property be taken for public use, without just compensation;" 153 and "when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law." (Const., art. 1, §§ 6 and 7.) This language, which presupposes the existence of the power outside of the Constitution, simply regulates the right to use it. It does not confer the power, but recognizing its existence, surrounds it with proper limitations. It prescribes no method of action, when the State acts for itself, but marks out certain boundaries which may not be crossed, even by the State. Within those boundaries the State, acting through that department which exerts the legislative power, may proceed at will, and the extent, method and necessity of exercising the power to take private property for public use may not be interfered with by either of the other departments of government. (Garrison *v.* City of New York, 88 U. S., 196.) All private property, both tangible and intangible, is subject to the right, including that already devoted to a public use, although the latter, as matter of policy rather than of right, is protected and favored by the State to some extent. (People *v.* Kerr, 27 N. Y., 188; Matter of the City of Buffalo, 68 N. Y., 167.) While the State may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to proper rights and the duty of paying therefor. There is no limitation upon the exercise of the power except that the use must be public; compensation must be made and due process of law observed. (Seconibe *v.* R. R. Co., 90 U. S., 108; Matter of Fowler, 53 N. Y., 60, 62.) Now, what does the phrase "due process of law" mean, when thus applied to the exercise of a sovereign power, and to the effort of government through that power to accomplish a great public purpose? Does it have the same meaning as when applied to the action of the State in punishing a man for crime, or of one individual in seeking to enforce a civil right against another? Due process of law necessarily varies with the facts of the case and depends upon the necessity for safeguards against the exercise of arbitrary power. It consists in the observance of those safeguards which time and experience have shown are necessary to protect the citizen in the enjoyment of life, liberty and property. In public prosecutions, as well as private controversies, an opportunity to be heard is essential to protect private rights; but here we have a case where the State has the right to take a man's property against his will, although he has been guilty of no wrong. It is a case where of necessity, if there is any action at all, it must be arbitrary. The State needs the property and takes it, and while the citizen cannot resist, he has the right to insist upon just compensation to be ascertained by an impartial tribunal. It is a compulsory purchase by public authority, and the individual receives money in the place of the property taken.

154 He has a right to his day in court on the question of compensation, but he has no right to a day in court on the question of appropriation by the State unless some statute requires

it. (Matter of Village of Middletown, 82 N. Y., 196, 201.) There is no necessity for any safeguard against taking, because the right to take is all there is of the power of eminent domain, and is necessarily conceded to exist when the existence of the power is admitted. Safeguards become necessary only when the question of compensation is reached, and then the courts are careful to see that the owner receives all that he is entitled to. Until then the courts could not help him, unless some statutory right were invaded, as the method of taking is within the exclusive control of the legislature. If a statute requires judgment of condemnation, judgment must be had accordingly before the property can be taken, but otherwise a certificate of condemnation by an executive officer, followed by payment, satisfies every requirement of the Constitution. If the use is not public, the statute authorizing condemnation is void, but this question of law need not be settled in the proceeding to take, as it can be raised by the property-owner in a variety of ways. It would be the same in effect as if the attempt to condemn had been made without any statute whatever, and an action of trespass against those who undertook to take possession of the property would settle the question. (Wheelock *v.* Young, 4 Wend., 648.)

As we have already seen, a method of procedure based upon long-established usage is due process of law. "It is sufficient * * * to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual mode, established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case." (Dent *v.* West Virginia, 129 U. S., 114, 124.) How does the procedure prescribed by the statute under consideration stand this test? What has been the course of proceeding authorized by law when the State has sought to appropriate property for itself under all our constitutions? The most extensive exercise of the right of eminent domain by the State was in the construction and enlargement of the Erie canal. That great undertaking was authorized by chapter 262 of the Laws of 1817, entitled "An act respecting navigable communications between the great western and northern lakes and the Atlantic ocean," the third section of which provides "that it shall and may be lawful for the said canal commissioners, and each of them, by themselves and by any and every superintendent, agent and engineer employed by them, to enter upon, take possession of and use all and singular any lands, waters and streams necessary for the prosecution of the improvements intended by this act, and to make all such canals, feeders, dykes, locks, dams and other works and devices as they may think proper for making said improvements, doing nevertheless no unnecessary damage; and that in case any lands, waters or streams taken and appropriated for any of the purposes aforesaid, shall not be given or granted to the people of this State, it shall be the duty of the canal commissioners from time to time, and as often as they think reasonable and proper, to cause application to be made to the justices of the supreme court,

or any two of them, for the appointment of appraisers," who, as the section further provides, are required "to make a just and equitable estimate and appraisal of the loss and damage, if any, over and above the benefit and advantage to the respective owners and proprietors or parties interested in the premises so required for the purposes aforesaid by and in consequence of making and constructing any of the works aforesaid." A similar provision was subsequently made for the taking of materials necessary to keep the canals in repair. (L. 1820, ch. 202, § 3.) The act providing for the enlargement of the Erie canal, as well as those authorizing the construction of the numerous collateral canals, simply conferred upon the canal commissioners the power to "enter on and take possession of and use all lands, streams and waters, the appropriation of which for the use of such canals and works shall in their judgment be necessary." (L. 1835, ch. 274, § 5; 1 R. S., 220, § 16; *id.* 662, § 109.) All the canals of the State were built under these acts, and much property of great value was appropriated solely under their provisions. For many years the powers thus conferred were in constant exercise, and although these statutes were often before the courts, not one was ever declared unconstitutional because of the summary method authorized in appropriating property. There was neither hearing nor notice, for the canal commissioners, or their agents, simply took possession of and used "all lands, streams and waters" which they deemed necessary for the use of the canals. This completed the condemnation, except that the damages when ascertained were paid by the State. Under some of the acts, if the property-owners filed their claims within one year after the appropriation, they received the amount awarded by the appraisers, and unless they filed their claims within the period mentioned they received nothing in the absence of special legislation. Adjudications made many years ago, and acquiesced in ever since, sustained, some directly and others indirectly, the constitutionality of this legislation, and without further discussion we hold that the statute under consideration is not unconstitutional because it does not provide for condemnation by due process of law. (*Wheelock v. Young*, 4 Wend., 647; *Jerome v. Ross*, 7 Johns. Ch., 315; *Rogers v. Bradshaw*, 20 Johns., 735.)

Just compensation, to be ascertained in the absence of agreement by an impartial tribunal, is an absolute right belonging to the owner of the property taken, but it is not necessary to provide for payment in advance, if a certain, convenient and adequate source and means of payment is provided. A distinction is made between direct action by the State and action under power delegated to a corporation created by the State, as the one is presumed to 156 be solvent while the other is not. Where, as in this case, the treasury of the State is pledged to meet the claim, payment need not be concurrent with the taking. (*Matter of Mayor, etc.*, 99 N. Y., 569.)

It is, however, contended, and the learned appellate division, by a majority vote, has so held, that the defendant, by filing its map and serving notice upon the occupants, acquired a lien, good even

as against the State, which entitled it to notice and compensation as an owner.

The act under which the plaintiff proceeded provides for service upon and compensation to the owners only. (L. 1897, ch. 220, §§ 4 and 5.) It differs in these respects from the canal statutes above referred to, which provided for no service upon any one, but authorized "every person interested in premises so appropriated" to file a claim for compensation. (1 R. S. (6th ed.), 647, § 16, and 659, § 48.) The theory of the statute before us is, that money is substituted for land, for by the 19th section provision is made for liens and incumbrances by the deposit of the amount awarded to the claimant, "to be paid and distributed to the persons entitled to the same as directed by the judgment" of the Court of Claims. (L. 1897, ch. 220, § 19.) Whether this provision is in all cases adequate, inasmuch as it does not necessarily give the owner of a lien on the premises, created by contract, such as a mortgage, an opportunity to be heard as to the amount of compensation, it is unnecessary to now decide, for, as we think, the defendant, by merely filing its map and profile and serving notice on the occupants, acquired no lien and no property right as against the State.

The map was filed in 1897, when the defendant had 985 years of corporate existence before it, and it had then been relieved for all time by the action of the railroad commissioners from the obligation of extending its road. If a lien upon the real estate covered by the map was thus created, it was good for the long period named and was virtually a perpetual incumbrance placed upon the property, which impaired its value by hindering sales and preventing improvements, and yet the holder of the lien was neither obliged to do anything by virtue thereof for the benefit of the public, nor even to compensate the owner. No action had been taken or money expended to extend the road when the State acted. Did the State by creating the defendant and giving it the power of eminent domain place in its hands a weapon to be used against itself? No argument is required to refute an absurdity. It may be said, however, that if the filing of a map created a lien good as against the State, it created one good as against the owner of the fee, with no obligation to make compensation, yet this would be a violation of the constitution and it has been so adjudged by this court. (*Forster v. Scott*, 136 N. Y., 537.)

But assuming it to be a lien, or something in the nature of a lien, as it was created by statute and not by contract, it can be done away with by statute, without liability to make compensation, unless some vested right has accrued under it.

157 Under a statute substantially like the one before us, so far as the point under consideration is concerned (L. 1836, ch. 242), it was held, in a well-considered case, that in proceedings to condemn land judgment creditors were not required to be made parties because they were in no sense owners; that upon completion of the proceedings and payment of the compensation to the owner, the right was acquired to possess and use the lands free from all judgment liens; that the lien of a judgment upon real estate is purely

statutory and that it is within the power of the legislature to abolish it at any time before rights have become vested; that a provision causing the lien of a judgment, which has not ripened into a title, to be superseded by the taking of the land through the right of eminent domain, on payment of compensation to the owner of the land only, is valid. (Watson v. N. Y. C. R. R. Co., 47 N. Y., 157.) In deciding that case Judge Rapallo said: "A judgment creditor of an owner has no estate or proprietary interest in the land. He stands wholly upon the law, which gives him a remedy for the collection of his debt by a sale of the land under execution, in case sufficient personal property of the debtor should not be found. This remedy is not secured by contract, but is purely statutory. * * * The duration of this lien and the mode of its enforcement and discharge are subjects which appertain to the laws for the collection of debts; and the rules upon those subjects have been changed, from time to time, according to the will of the legislature. The power of the legislature to regulate those matters cannot be doubted. Acts have been passed shortening and lengthening the duration of the liens of existing judgments, and even providing for their extinguishment without any proceeding to which the judgment creditor was a party. * * * It is clearly within the power of the legislature to abolish the lien of all judgments at any time before rights have become vested or estates acquired under them. * * * This would be no greater exercise of power than the abolition of the right of distress for rent, or of the lien of the landlord on property taken in execution, or of the right of imprisoning the debtor. Yet the validity of such laws has been fully recognized even where they affected existing claims or judgments. They do not take away property, or affect the obligation of contracts, but simply affect legal remedies. There can, therefore, be no doubt of the validity of a provision causing the lien of a judgment, not ripened into a title by a sale, to be superseded by the taking of the land under proceedings in exercise of the right of eminent domain, on payment of compensation to the owner of the land. We think that the act of 1836 had that effect." After analyzing the act which, as already stated, is on all fours with the act under consideration, the learned judge continued: "The whole amount of this appraisement is directed to be paid to the owners. There is no provision for assessing the value of the interest of the owners, subject to the lien of judgments, or for retaining any part of the value of the land as indemnity against

158 such judgments. The whole value must be paid to the owners, or deposited in bank, and the owners are left to pay their own debts. The act then states what right the company shall obtain by virtue of such payment to the owners, and the order made thereupon. On the completion of the proceedings, the company is declared to be possessed of the land during its corporate existence, with the right to use the same for the purposes of the road. This declaration excludes the implication, that, after the owners have been compensated, the right of any other person to interfere with the possession or use of the land is reserved, or that, in order to retain such use, the company is bound to satisfy liens of judgment

creditors, after having been compelled to pay the whole value of the land to the owner. What recourse the judgment creditor might obtain in equity upon the proceeds paid to, or deposited to the credit of the owner, is a question not involved in this controversy; neither is it necessary to consider how the rights of mortgagees would be affected by the proceeding, or what protection they could obtain. The matter of the lien of judgments being wholly under the control of the legislature, they had power to confer upon the company the right of possession and use of the land free from all such liens, on paying the value of the land to the owner; and we think it was manifestly their intention so to do, modifying to that extent the laws giving liens to judgment creditors."

We can see no difference in principle between that case and this. Neither the lien of the judgment in that case, nor the pretended lien of the map in this, was created by contract, and no vested right had accrued under either. The State, therefore, had absolute control of the subject in the one case as much as the other. If there was any lien in the case before us it was created by statute and could be abolished by statute, either after the map was filed, or by doing away in advance with the ordinary effect of the map if filed after the passage of the act, which, when reasonably construed, in the light of the broad purpose to be accomplished, had that effect in this case the same as it had in the Watson case. See, also, *Morse v. City of New York* (8 N. Y., 110), where it is held that when lands are taken for public use under the power of eminent domain, upon payment of their value to the owner of the fee, the public acquires an absolute title divested of the wife's inchoate right of dower.

We do not think, however, that any lien, or any right in the nature of a lien, can be created as against the State by the simple filing of a map by a corporation organized to construct a railroad. As there is no language expressly giving it that effect, in the nature of things the legislature did not intend to clothe a creature of the State with the right to hold up the paramount power and compel it to pay money for the bare filing of a map, which is not the commencement of condemnation proceedings, for it is filed under the railroad law, while condemnation is had under the Code of Civil Procedure.

(R. R. Law, § 6; Code Civ. Pro., §§ 3357, 3384.) A proceeding 159 cannot be held to be continuous when the first act may be done over nine hundred years before the second step is taken. Even if it were inchoate condemnation, it could not be used against the State, because a delegated power of eminent domain cannot be turned against the sovereign which conferred it and which is the source of all power. What then, it may be asked, was the effect of filing the map, and what function did it perform? The effect of the map when filed was to give warning to other railroads that a certain route had been pre-empted by the defendant. It established no right against the owner, because the Constitution forbids it; it established none against the State, because its power is paramount, but as against all other railroad companies and as against all other creatures of the State, empowered to use the right

of eminent domain, it gave the exclusive right to occupy the particular strip of land for railroad purposes until the legislature authorized it to be devoted to some other public use.

The general language used in certain cases relied upon by the defendant should be read in the light of the facts then before the court. (Rochester, etc., R. R. Co. v. New York, etc., R. R. Co., 110 N. Y., 128; Suburban Rapid Transit Co. v. Mayor, etc., 128 N. Y., 510.) These cases simply involved controversies between corporations created by the State as to a located line, the legislation necessary to enable one corporation to condemn land previously condemned by another and the like. The State was not a party to any of them, and the only question involved was as to which corporation was ahead. The so-called lien was simply an exclusive right of one of two contending railroad corporations, as against the other, to build a road on a certain piece of land, or of a railroad corporation to hold land already condemned for a public use, as against a city seeking to condemn it for another public use, without special authority from the legislature. The general effect of filing a map was not involved, but the particular effect as between two corporations, each trying to get the same land. The paramount right of the State to modify statutes, before vested rights have been acquired under them, was not involved. Here the question arises between the State and one of its creatures, and the claim that a lien, good as against the creator of the corporation, was placed upon the land simply by the grant of a franchise to exist as a corporation in order to build a road, followed by the filing of a map of the proposed route and notice thereof to the occupants, but by nothing else, cannot be sustained. There is no property in a naked railroad route, existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation. (Pearsall v. Great Northern R'y, 161 U. S., 646; Bank of Commerce v. Tennessee, 163 U. S., 416, 424; Galveston, etc., R'y Co. v. Texas, 170 U. S., 226, 240; Matter of Rensselaer, etc., R. R. Co., 43 N. Y., 137; Matter of Washington Park Commissioners, 56 N. Y., 144; 160 N. Y. C. & H. R. R. Co. v. Aldridge, 135 N. Y., 83; Archibald v. N. Y. C. & H. R. R. Co., 157 N. Y., 574.)

That the use for which the land in question was appropriated is a public use cannot well be questioned. The object of the legislature was to create a great public park for the promotion not only of health and pleasure, but of commerce as well. The statute declares that it is "for the free use of all the people for their health and pleasure," as well as "the preservation of the head-waters of the chief rivers of the State, and a future timber supply." (L. 1895, ch. 395, § 270.) The creation of the park is a part of the permanent policy of the State, for the people have imbedded the project in the constitution and have made the lands devoted to the purpose absolutely inalienable. (Const., art. 7, § 7.) The use is not restricted, either by legislation or circumstances, to a special locality, or to a limited number of inhabitants, but is extended to all the people. If authorities are needed to show that property taken for a public

park is taken for a public use, the following may be consulted: *Shoemaker v. U. S.* (147 U. S., 252); *Brooklyn Park Commissioners v. Armstrong* (45 N. Y., 234); *Matter of Central Park* (63 Barb., 282); *Lewis, Eminent Domain* (§ 175); 10 Am. & Eng. Encyc. (2nd ed.), 1084.

Considering the language of the constitution and statute, the situation, nature and object of the park, the constitutional inhibition against transferring any part of it, the well-known danger of destruction of forest lands by fires communicated by locomotives, and it is clear that the two uses, for such a park and for a railroad operated by steam, are inconsistent public uses which cannot stand together. The primary object of the park, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving timber for use in the future. The command of the constitution, that the lands of the forest preserve cannot be "taken by any corporation, public or private," shows an unmistakable intention to keep railroads out of the Adirondack park.

There are other questions in the case, but they cannot be discussed without unduly lengthening this opinion. After examining them all, we are of the opinion that the order appealed from should be reversed and the judgment entered upon the decision of the special term affirmed, with costs.

All concur (Gray, J., in result, upon the ground that the act of 1897, under which the forest preserve board acted, was constitutional, and the State acquired the land in question by the exercise of a power which superseded any lien the defendant might have obtained by the initiatory steps taken, and Haight, J., concurs in result).

Order reversed and judgment entered upon the decision of the special term affirmed.

A copy.

E. H. SMITH,
State Reporter.

R.

161 UNITED STATES OF AMERICA, ss:

The President of the United States to the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein The Adirondack Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Alton B. Parker this 20th day of October, in the year one thousand eight hundred and ninety-nine.

ALTON B. PARKER,

Chief Judge of the Court of Appeals of the State of New York.

Sufficient service of the foregoing citation and receipt of a copy thereof admitted this 20th day of October, 1899.

JOHN C. DAVIES,

Attorney General of the State of New York, Attorney for Defendants in Error in Court Below.

EDWARD WINSLOW PAIGE,
Of Counsel.

Endorsed: Filed October 20th, 1899.

162 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of said State of New York, do hereby certify that the annexed papers constitute and are the original writ of error allowed herein by the Honorable Alton B. Parker, chief judge of the court of appeals, and true copies of the petition for said writ, of the bond filed upon the granting of said writ, of the record and proceedings upon which said court of appeals acted in rendering judgment herein, of the judgment and opinion of said court, and of the citation herein, with proof of service thereof, and of the whole of each and every of said papers, the originals of all which were duly filed with the clerk of the court of appeals.

In witness whereof I have hereunto set
Seal Court of Appeals, my hand and affixed my official seal, at
State of New York. the city of Albany, this thirtieth day of
October, A. D. 1899.

W. H. SHANKLAND, Clerk.

163 [Endorsed:] Adirondack Railway Company, plaintiff in error, against The People of the State of New York, defendants in error. Writ of error and return. R. Burnham Moffat, attorney for plaintiff in error, 63 Wall street, New York.

164 In the Supreme Court of the United States, October Term, 1899.

ADIRONDACK RAILWAY COMPANY, Plaintiff in Error, }
 }
 }
against }
THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error. }

Afterwards, to wit, on this third day of November, in the year one thousand eight hundred and ninety-nine, comes the said Adirondack Railway Company, by R. Burnham Moffat, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I. That there was no sufficient evidence to warrant the court below in holding that at any time on or prior to the 7th of October, 1897, on which day notices of *lis pendens* in the condemnation proceedings were filed, recorded, and indexed, as required by statute, the State of New York had acquired or then held any equitable ownership of or interest in the six-rod strip of land across township 15, and the effect of the erroneous ruling by the court below that on said 7th day of October, 1897, the State of New York had acquired and did then hold an equitable ownership of or interest in said six-rod strip was to deprive the plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

165 II. That the court below erred in its ruling that the State of New York acquired or could acquire by the voluntary grant from the Indian River Company of said six-rod strip of land any larger interest therein than the grantor was seized or possessed of, and the effect of such erroneous ruling by said court was to deny to the plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive the plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

III. That the court below erred in its ruling that so much of chapter 220 of the Laws of 1897 as authorized the seizure by the forest preserve board of lands lying within the limits of the Adirondack park was a valid enactment, for the reason that said provisions authorize the taking of private property for an alleged public use without due process of law and without providing for the making of compensation to the owners of the property so taken, in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

IV. That the court below erred in its ruling that the enactment by the legislature of the State of New York of chapter 220 166 of the Laws of 1897 was a valid enactment, for its effect as declared by said court was to deprive this plaintiff in error of its right to extend the line of its road across said six-rod strip. The right so possessed by the plaintiff in error and pursuant to which it was proceeding was a franchise theretofore granted to it by the State of New York constituting a valid and subsisting contract between the people of said State and this plaintiff in error. The law of 1897, therefore, as construed and declared by the court below impaired and put an end to the obligation of such contract on the part of said People of the State of New York, in violation of the provisions, restrictions, and safeguards of section ten of article one of the Constitution of the United States.

V. That the court below erred in its ruling that by the proceedings had under chapter 220 of the Laws of 1897 the State of New York acquired an ownership of said six-rod strip exclusive as against

the plaintiff in error, for the effect of such ruling was to deny to the plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive this plaintiff in error without due process of law and without any compensation whatsoever therefor of its vested franchise or property right to extend the line of its road over such six-rod strip, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

167 VI. That the court below erred in its ruling that by the proceedings had under chapter 220 of the Laws of 1897 the right of the plaintiff in error to extend the line of its road across said six-rod strip was in anywise defeated or even affected. Under the statutes of the State of New York, as uniformly interpreted and construed by the court of last resort thereof, a railroad corporation organized and existing under the laws of said State acquired upon its doing what the evidence discloses had been done by this plaintiff in error an indestructible and valuable property right, of which it could be deprived *in invitum* only by due process of law and upon the making to it of compensation therefor. The effect of such erroneous ruling by the court below was to deny to the plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive it without due process of law and without any compensation whatsoever therefor of its said property right to extend the line of its road over such six-rod strip, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

VII. That the court below erred in its ruling that notwithstanding its conceded compliance with the provisions of the statute law of the State of New York for the extension of the line of its road the plaintiff in error acquired no lien upon, easement over, or right in or to said six-rod strip which it could assert against the Indian River Company or against the State of New York. The plaintiff in error was proceeding under a franchise which necessarily gave to it such lien, easement, or right, which constituted and was a part of said franchise, and the effect of such ruling of the court below was to impair the obligation thereof on the part of the State, in violation of the provisions, restrictions, and safeguards of section ten of article one of the Constitution of the United States.

168 VIII. That the court below erred in its assumption that the plaintiff in error had done nothing to extend its line across said six-rod strip beyond filing a map and profile and serving notice on the occupants, as required by statute; for it appeared to the court by competent and unquestioned evidence that the plaintiff in error had invested divers sums of money in full reliance upon its franchise or vested right so to extend the line of its road over such six-rod strip. The effect of the erroneous assumption of the court below in this regard was to deprive this plaintiff in error without due process of law and without any compensation whatsoever therefor of its vested franchise or property right so to extend the line of its

road, in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

IX. That the court below erred in its ruling that the People of the State of New York ever acquired the title to or interest in said six-rod strip, except as subject to the right of this plaintiff in error to construct, maintain, and operate its railroad thereover, and the effect of such erroneous ruling was to deny to plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive this plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

169 X. That the court below erred in its ruling that this plaintiff in error was not at the time of the commencement of this action and is not now lawfully possessed of the right to construct, maintain, and operate its railroad over said six-rod strip, and the effect of such erroneous ruling was to deny to plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive this plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, and to impair the obligation of a valid and subsisting contract between the People of the State of New York and this plaintiff in error, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States and of section ten of article one of said Constitution.

XI. That the court below erred in reversing the order of the appellate division of the supreme court of the State of New York and in affirming the judgment of the special term of said supreme court with costs, and the effect of such ruling by the court below was to deny to this plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive this plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, and to impair the obligation of a valid and subsisting contract between the People of the State of New York and this plaintiff in error, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States and of section ten of article one of said Constitution.

170 Dated November 3rd, 1899.

R. BURNHAM MOFFAT,
Attorney for Plaintiff in Error, 63 Wall Street, New York.

171 [Endorsed:] Adirondack Railway Company, plff in error,
vs. The People of the State of New York, def'ts in error.
Original. Assignments of error. R. Burnham Moffat, attorney for plaintiff in error, 63 Wall street, New York city.

Endorsed on cover: File No., 17,553. New York court of appeals. Term No., 439. The Adirondack Railway Company, plaintiff in error, *vs. The People of the State of New York.* Filed November 3rd, 1899.

1673

Dec. 4, 1899.

DEC 4 1899
JAMES M. MCKENNEY,

Supreme Court of the United States,
Motion to Advance.
OCTOBER TERM, 1899.

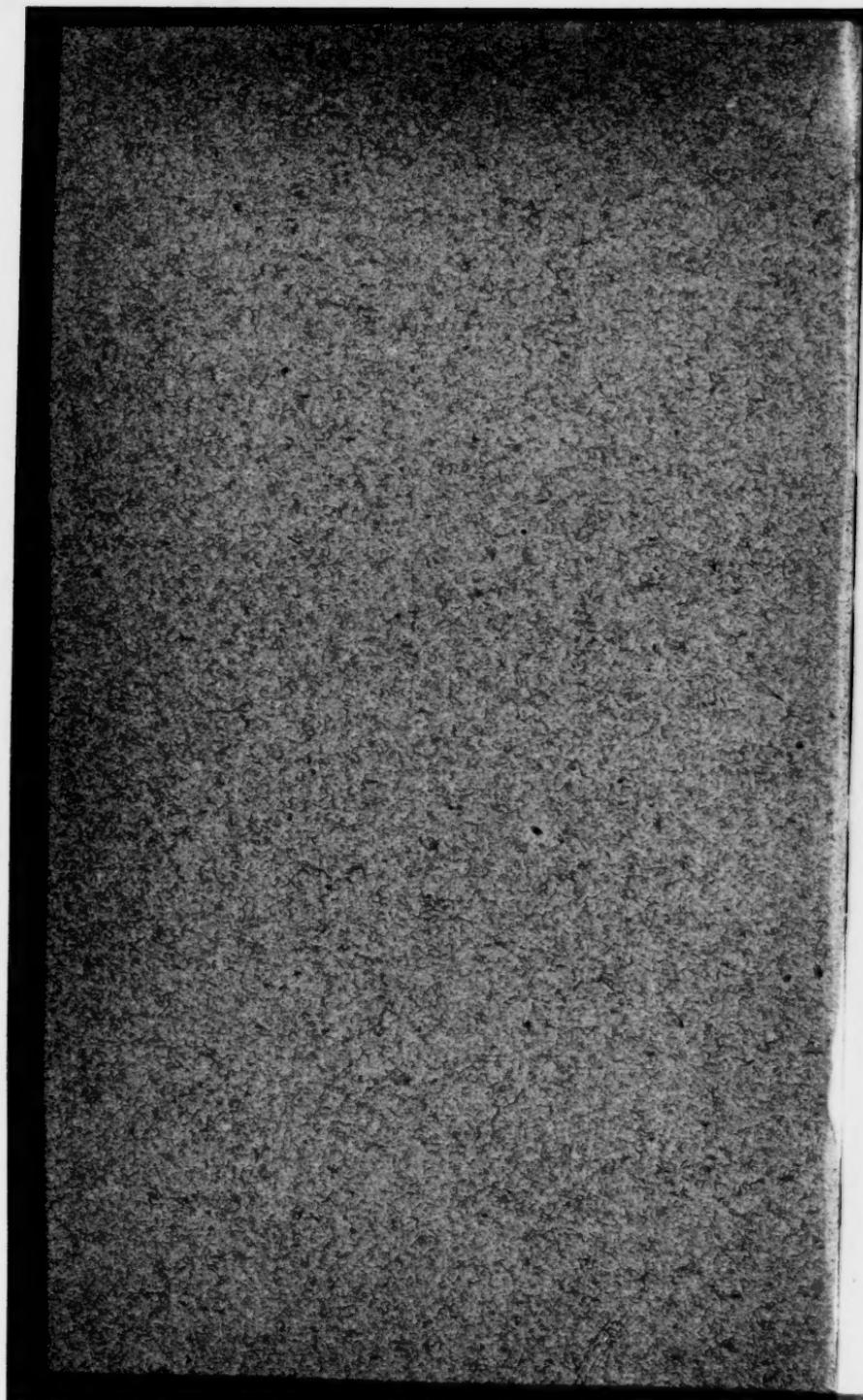
Filed Dec. 4, 1899.

ADIRONDACK RAILWAY COMPANY,

Plaintiff in Error
against

THE PEOPLE OF THE STATE OF
NEW YORK.

MOTION TO ADVANCE.



The People of the State of New York do respectfully ask the Court to advance this case, not only because the Adirondack Park and the storage of water for the upper Hudson and the Champlain canal are threatened, but because the sovereignty of New York is doubted.

EDWARD WINSLOW PAIGE,
Of Counsel.

Come now the People of the State of New York and respectfully move the Court that this case be advanced for argument

IN THE SUPREME COURT OF THE UNITED STATES

.....Fourth of December, one thousand eight hundred and ninety-nine.

Statement.

The CONSTITUTION of New York contains the following:
Section seven of Article seven:

“The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by ANY corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.”

Section seven of Article one:

“§ 7. When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.”

On the eighth of April, 1897, the legislature of New York passed a law which contained the following:

“§ 2. It shall be the duty of the forest preserve board and it is hereby authorized to acquire for the state, by purchase or otherwise, land, structures or waters or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game and forest law, as it may deem advisable for the interests of the state.

“§ 3. The forest preserve board may enter on and take possession of any land, structures and waters in the territory embraced in the Adirondack park, the appropriation of which in its judgment shall be necessary for the purposes specified in section two hundred and ninety of the fisheries, game and forest law, and in section seven of article seven of the constitution.

“§ 4. Upon the request of the forest preserve board an accurate description of such lands so to be appropriated

“ shall be made by the state engineer and surveyor, or the
“ superintendent of the state land survey, and certified by
“ him to be correct, and such board or a majority thereof
“ shall indorse on such description a certificate stating
“ that the lands described therein have been appropriated
“ by the state for the purpose of making them a part of
“ the Adirondack park: and such description and certifi-
“ cate shall be filed in the office of the secretary of state.
“ The forest preserve board shall thereupon serve on the
“ owner of any real property so appropriated a notice of
“ the filing and the date of filing of such description and
“ containing a general description of the real property be-
“ longing to such owner which has been so appropriated;
“ and from the time of such service, the entry upon and
“ appropriation by the state of the real property described
“ in such notice for the uses and purposes above specified
“ shall be deemed complete, and thereupon such property
“ shall be deemed and be the property of the state. Such
“ notice shall be conclusive evidence of an entry and ap-
“ propriation by the state.”

“ § 6. If the forest preserve board is unable to agree
“ with the owner for the value of the property so taken or
“ appropriated, or on the amount of damages resulting
“ therefrom, such owner, within two years after the
“ service upon him of the notice of appropriation as above
“ specified, may present to the court of claims a claim
“ for the value of such land and for such damages, and
“ the court of claims shall have jurisdiction to hear and
“ determine such claim and render judgment thereon.”

By the railroad law of New York a railroad company locates its line by filing a map of its line in a county and giving notice of the filing to all occupants of the land.

After fifteen days, if no application has been made to the Supreme Court of New York to change the line it be-

comes located, and the railroad company may then take the land by the right of eminent domain, by a proceeding which takes at least fifteen days, and which requires payment of the money to the owner of the land before the railroad company can enter upon it.

In 1881 the Adirondack Railway Company was incorporated to build and operate a railroad from Saratoga Springs to Ogdensburg on the St. Lawrence and of course through the middle of the North Woods. On the first of August, 1897, it owned and was operating a railroad from Saratoga northwesterly to North Creek.

Township 15, T. & C., lies north westwardly from North Creek and wholly within the bounds of the "forest preserve" as the same had been already established by law at the adoption of the provision of the Constitution quoted and it is also wholly within the bounds of the "Adirondack park."

In August, 1897, The Forest Preserve Board made an oral agreement to buy Township fifteen and certain additional land for ninety-nine thousand dollars.

On the eighteenth of September the Adirondack Railway Company filed in the counties of Hamilton, Warren and Essex, in all of which counties Township fifteen is, a map and survey for the extension of its railroad from North Creek across Township fifteen, and served the location notices.

On the first of October the owner was about to convey to the State Township fifteen and the other land, and to receive its money, when they were stopped by an injunction got by the Adirondack company.

They thereupon did this: they put up the deed in escrow, to be delivered when the injunction was dissolved. They made and delivered another deed—*excepting* the land described in the railroad survey—and delivered it.

This was the *first* of October.

On the *seventh* of October the Forest Preserve Board met again, and it having been reported to the Board that Mr. Justice McLaughlin, who had made the injunction, had declined to vacate it, the Forest Preserve Board took the strip of land described in the railway map, by the right of eminent domain, under the above-quoted law; that is to say—the state engineer at the request of the forest preserve board made a description of the strip of land and certified it to be correct—the forest preserve board indorsed on it a certificate stating that the lands described therein had been appropriated by the State for the purpose of making them a part of the Adirondack Park; filed the whole thing in the office of the secretary of state; afterwards served it on the owner, and paid the ninety-nine thousand dollars.

On the same day, but after the service on the owner as just stated the Adirondack Railway Company began condemnation proceedings against the same owner in the three counties, to take the same strip across Township fifteen.

The State went into possession and began the construction of a dam for the storage of water for the upper Hudson and the Champlain Canal.

And it brought this action to enjoin the Adirondack Company's condemnation proceedings. The trial resulted in such a judgment, which was reversed by the Appellate Division of the Supreme Court, but finally affirmed by the Court of Appeals of New York.

The Adirondack Company now brings the case here.

It has always claimed that by its location it had acquired a lien upon that part of Township fifteen, and that the proceedings by the forest preserve board were not due process of law within the meaning of the fourteenth amendment to the constitution of the United States.

It also claims that by its charter, which is an old one—the present company being a reorganized corporation—it has a binding contract with the State by which it has the right to build its road across the North Woods, and that the constitutional provision, already quoted, keeping railroads out of the North Woods, which was not adopted until 1894, violates the obligation of that contract.

Schenectady, ss.:

EDWARD WINSLOW PAIGE, being duly sworn, says, that evidence of the facts in the foregoing statement was given on the trial and is contained in the record.

EDWARD WINSLOW PAIGE.

Sworn before me this thir- }
teenth October, 1899. }

J. S. LANDON,

J. S. C.

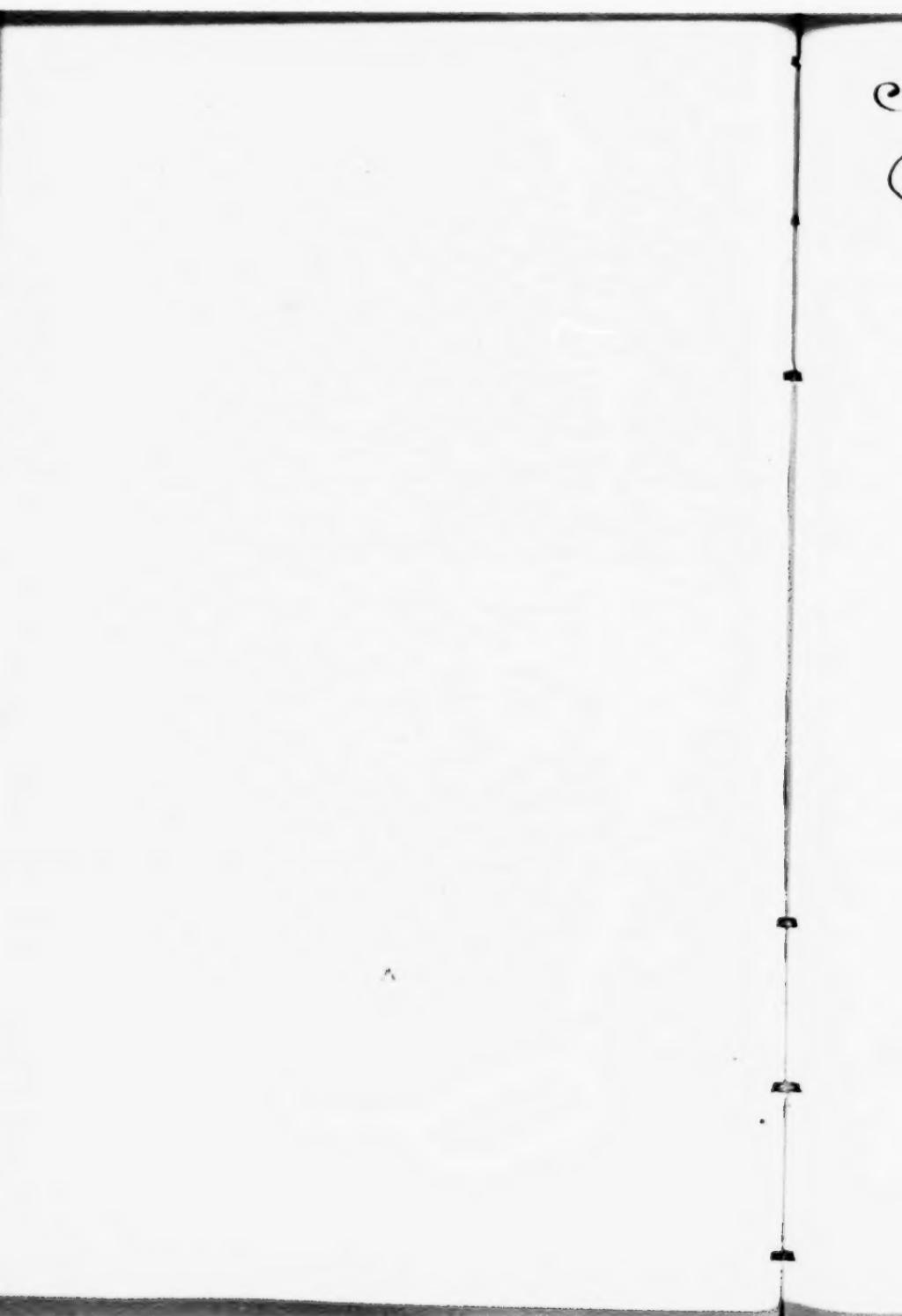
SIR:

You will take notice that the above motion will be made to the Supreme Court on the fourth day of December 1899.

Yours very truly,

EDWARD WINSLOW PAIGE,
Attorney.

To R. BURNHAM MOFFAT, Esq.,
Attorney for Plaintiff in Error.



N. 439.

FILED
JAN 10 1900
JAMES H. MCKENNA

Brief of Moffat for P.C.
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1899.

Filed Jan 10, 1900.
No. 439.

THE ADIRONDACK RAILWAY COMPANY,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

R. BURNHAM MOFFAT,
Counsel.



Supreme Court of the United States.

ADIRONDACK RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

THE PEOPLE OF THE STATE OF NEW
YORK,
Defendants in Error.

October Term, 1899.
No 439.

The case comes before this Court on writ of error to the Court of Appeals of the State of New York, allowed by Hon. ALTON B. PARKER, Chief Judge thereof. Owing to the importance of the questions involved, the cause was advanced by order of this Court made December , 1899, and was set for hearing on January 8, 1900.

Abstract of the Case.

Suit was brought by defendants in error in the Supreme Court of the State of New York, to enjoin perpetually the plaintiff in error, a railroad corporation of that State, from continuing certain condemnation proceedings theretofore instituted by it for the acquisition of its right of way over a tract of land in Hamilton County, New York, known as Township 15, Totten and Crossfield's Purchase, on the ground that the State of New York had become seized of the fee of the particular strip across said Township, six rods wide, whereon plaintiff in error had located its line. The State claimed to have acquired the fee of such strip either by voluntary grant from the owners or by

virtue of proceedings which it had taken for the condemnation or seizure thereof under the provisions of Chapter 220 of its Laws of 1897, (Record, pp. 5-7), and insisted that by virtue of the provisions of Article 7 of Section 7 of its Constitution, which went into effect on January 1, 1895, the plaintiff in error had no power whatsoever to acquire a right of way over such strip. The constitutional provision relied upon reads as follows:

“The lands of the State, now owned or hereafter acquired, constituting the Forest Preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be removed or destroyed.”

Not only Township 15, but all of Hamilton County lay wholly within the Forest Preserve as fixed by law at the time said constitutional provision went into effect (Record, p. 31).

The owners of the land, having been parties defendant to the condemnation proceedings which it was sought to enjoin, were made parties defendant in this suit by the State; but none of them appeared or answered and the issues presented by the complaint were contested only by the Railway Company, the plaintiff in error herein (Record, p. 31).

The Railway Company's answer (1) denied that the State had ever acquired the title to such strip, either by grant or by condemnation, *except* as subject to the right of plaintiff in error to construct, maintain and operate its railroad thereover; (2) insisted that the condemnation features of the Act of 1897 under which the State justified its claim of title by seizure, were in any event unconstitutional and void in that they authorized the taking of private property by the State without due process of law, and therefore in violation of the provisions of the State Constitution (Record, p. 36) and of the Fourteenth Amendment to the Constitution of the United States (Record, p. 37); (3) insisted that in so far as any proceedings had under the condemnation features of the Act of 1897 could be held to vest a title to said strip in the State, exclusive of the right of plaintiff in error to construct, maintain and operate its railroad thereover, those features of the act were unconstitutional and void in that

they authorized the taking of private property for an alleged public use without the making of any compensation whatsoever therefor, in direct violation of section six of Article One of the State Constitution (Record, p. 36) and of the Fourteenth Amendment to the Constitution of the United States which prohibits any State from denying to any person within its jurisdiction the equal protection of its laws or of depriving any person of his property without due process of law (Record, p. 37); and (4) insisted that said Act of 1897, in so far as it authorized the condemnation of said strip by the State, to the exclusion of the right of plaintiff in error to construct, maintain and operate its railroad thereover, was unconstitutional and void, as violating the provisions of section ten of Article One of the Federal Constitution (Record, p. 37), in that it impaired the obligation of a contract then existing between the State and this plaintiff in error.

There has been no dispute of fact between the parties to this litigation on any point at all material to the questions involved. The case was tried at Special Term, Albany County, before Mr. Justice CHESTER, who granted the relief prayed for, and judgment was entered accordingly (Record, pp. 38-39). He handed down an opinion which is printed at pages 40-42 of the Record, and which, it will be seen, declines to discuss the constitutional questions presented.

The Railway Company appealed to the Appellate Division, which reversed the judgment of Special Term, and ordered a new trial (Record, p. 74). The prevailing opinion was written by PARKER, P. J., who, relying upon three well settled and unambiguous decisions of the Court of Appeals which had stood unquestioned for a period of ten years or more and had been universally followed and regarded as the law of the State,—decisions holding that upon a railway company's doing what it was shown this plaintiff in error had done, the land was impressed with a lien in favor of its right to construct which would ripen into title upon purchase or condemnation,—held that in so far as the State took the strip by voluntary grant it took it subject to such lien or right, and in so far as it claimed title by condemnation it had condemned only as against the owner and had therefore acquired only what the owner had, namely, the

fee of the land subject to such lien or right in the railway company (Record, pp. 75-77). Justices LANDON and MERWIN concurred, Justice HERRICK alone dissenting; and he wrote a long dissenting opinion which is printed at pages 77-92 of the Record. Justice HERRICK, too, (p. 92) refrained from discussing the questions raised as to the constitutionality of the Act of 1897, resting his dissent wholly upon *his* view of the situation, namely, that the railway company had not acquired, by what it was shown to have done, any right to condemn its located line or indeed any property right of any kind which the State was bound to respect.

The defendants in error thereupon appealed to the Court of Appeals, giving the stipulation required by the State Constitution (Appendix to Brief, p. 2) that in the event of the order of the Appellate Division being affirmed judgment absolute might be entered against them (Record, p. 74).

Judge VANN wrote the opinion in the Court of Appeals concurred in by all the judges. It will be found at pages 93-106 of the Record. He devoted himself almost wholly to the question of the constitutionality of the Act of 1897, and pronounced it valid. He held that plaintiff in error had acquired, by what it had done, no property right of any kind which was good as against the State; and he ran away (and we are willing after further deliberation to concede quite properly so, although in our opinion he ran too fast and too far) from the three aforementioned decisions of that Court, upon which we had relied in our arguments below. Those decisions will be discussed hereafter.

Statement of Facts.

In 1863, an act was passed by the legislature of the State of New York, entitled:

“AN ACT to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of this State, and the development of the resources thereof.” (*Laws 1863, Chap. 236.*)

By this act, Albert N. Cheney and his associates were authorized to make and file articles under the then general railroad law of the State (*Laws 1850, Chap. 140*), "for the purpose of "constructing and operating a railroad from some point in the "county of Saratoga up and along the valley of the upper Hudson "into the wilderness in the northern part of the State" (Appendix to Brief, p. 28).

By section 2 of the Act certain tax exemptions and other privileges were granted the corporation so to be formed, which, however, have no direct bearing on the questions now before the Court. Section 3 provided for an annual report, and section 4 gave to the company so to be formed still other privileges having no direct bearing on the matters under consideration. The remaining sections, 5, 6 and 7, dealt with the time of completion which also is unimportant in view of the extensions subsequently granted by the legislature (Appendix to Brief, pp. 30-36).

Under this act, a company known as the "Adirondack Company" was incorporated on October 24th, 1863, and at once commenced the construction of its railroad, and the utilization of the other privileges granted (Record, p. 71).

In 1865, another act was passed, entitled:

"AN ACT to authorize the Adirondack Company to extend its railroad to Lake Ontario or River St. Lawrence, and to increase its capital stock." (*Laws 1865, Chap. 250.*)

Under this act, authority to amend its articles of association was granted the Adirondack Company so as to enable it, under the general law, to extend its road as in the title of the act set forth and to increase its capital stock by not more than \$5,000,000 additional (Appendix to Brief, p. 30).

The original articles of association had fixed the northerly terminus of the road in the town of Newcomb, Essex County, which this Court will judicially note is beyond and to the north-eastward of and further in the wilderness than is Township 15, Hamilton County. Under the authority conferred by the Act of 1865, the Adirondack Company on March 1st, 1871, amended its articles so as to fix as its northerly terminus "a point on the St. Lawrence River in the town of Oswegatchie in the County

"of St. Lawrence, making the whole length of its railroad, including such extensions, as near as may be, 185 miles of railroad line passing through and into the counties of Warren, "Essex and Hamilton," among others; and it increased its capital stock (Record, p. 71). Ogdensburgh was the objective point, described as "a point on the St. Lawrence River in the town of Oswegatchie in the County of St. Lawrence."

Sundry other acts of the legislature were passed for the relief of the Adirondack Company, granting it right to build branches, extending time of completion, etc., etc., which it is unnecessary here to note. They will be found in the Appendix to this Brief.

On July 1st, 1872, and pursuant to the authority conferred by subd. 10 of §28 of the then general railroad law (*Laws 1850, Chap. 140*,—see Appendix to Brief, p. 6) the Adirondack Company executed a mortgage to the trustees named therein of "all and singular its railroad, and property connected therewith, together with the rights, privileges, franchises and immunities of said Adirondack Company" to secure the payment of its bonds to be issued thereunder (Record, p. 71).

The bonds were issued and some years later and upon default in payment of the interest thereon foreclosure was had; and by decree entered June 28th, 1881, a sale of the whole of the property, rights and franchises covered by said mortgage was directed (Record, p. 71). A sale was had pursuant to the decree and by referee's deed dated October 21st, 1881, the purchasers acquired title to all the "railroad, mortgaged lands and other property, franchises, privileges, easements, rights, immunities and liberties of said Adirondack Company covered by or included in said mortgage" (Record, p. 71).

Pursuant to the authority conferred by *Laws 1873, Chap. 469*; *Laws 1874, Chap. 430*; and *Laws 1876, Chap. 446*, relating to the reorganization of railroads sold under mortgage and the formation of new companies in such cases (Appendix to Brief, pp. 9-18), the purchasers organized the plaintiff in error herein, the Adirondack Railway Company. The certificate was dated June 30th, 1882, and was filed and recorded in the office of the Secretary of State on July 7th, 1882. It provided that the life of the new corporation should be one thousand

years; that its railroad constructed and to be constructed should extend from a point in the town of Saratoga Springs, in the county of Saratoga, to a point in the town of Hadley, in said county of Saratoga, and thence up and along the valley of the upper Hudson to the town of Newcomb in the county of Essex, and thence to the River St. Lawrence at or near the city of Ogdensburg; that the length of the road was to be 185 miles; and that the counties of the State through and into which the road was and was to be built were Saratoga, Warren, Essex, Hamilton, Franklin and St. Lawrence (Record, p. 72).

At the time of the foreclosure sale the Adirondack Company had constructed and was operating its line from Saratoga Springs to a point in the town of Hadley and thence up and along the valley of the upper Hudson as far as North Creek in Warren County,—a distance of sixty miles (Record, p. 19). The Court will note that this deposition was read in evidence as proof of the facts therein deposed to (See Record, p. 72).

It will thus be seen that upon the filing of said certificate by the purchasers at foreclosure and their associates, the Adirondack Railway Company, the plaintiff in error herein, became under *Laws 1876, Chap. 446*, and was "vested with and entitled "to exercise and enjoy, all the rights, privileges and franchises" which at the time of the foreclosure sale belonged to or were vested in the Adirondack Company or its receiver, and was subject to all the provisions, duties and liabilities imposed by the general railroad act of 1850 except so far as said provisions, duties and liabilities might be inconsistent with the Act of 1876, and with the rights, privileges or franchises formerly belonging to the Adirondack Company (Appendix to Brief, p. 14).

Laws 1873, Chap. 469, which had never been repealed (See Appendix to Brief, p. 9), provided that upon the filing of such certificate, the body politic and corporate so formed "shall "exist for the time, and may and shall possess, exercise and "enjoy, all the powers, privileges, rights, liberties, easements "and franchises possessed by the said former corporation, and "in the same manner, and to the same extent, and with the "same force and effect as the same could have been exercised by "the said former corporation, had not such sale as aforesaid "been made."

By the act of 1876 last referred to, which amended certain sections of chapter 430 of the laws of 1874, the reorganized company while possessing all the rights, privileges and franchises of the original company was expressly declared to be subject to all the provisions, duties and liabilities imposed by the general railroad act of 1850 and of the acts amendatory thereof, except in so far as the same might be inconsistent, among other things, with the provisions of the act of 1876. Now, in 1867, the general railroad act had been amended by an act (*Laws 1867, Chap. 775*) which provided that if any corporation formed under the general law of 1850 should not finish its road and put it in operation within ten years from the time of filing its articles of association, its corporate existence and powers should cease (Appendix to Brief, p. 7).

The Adirondack Railway Company thus became obligated by law to finish its road and put it in operation prior to July 7th, 1892, on pain of losing its corporate existence and powers.

In 1889, however, an act was passed (*Laws 1889, Chap. 236*) which added a new section to Chapter 430 of the Laws of 1874 relating to the reorganization of railroads sold under mortgage and providing for the formation of new companies in such cases. The section so added read:

“ Nothing herein contained shall be construed to compel a corporation organized under this act to extend its road beyond the portion thereof constructed at the time said corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the State shall certify that in their opinion the public interests under all the circumstances do not require such extension. If said board shall so certify and shall file in their office such certificate (which certificate shall be irreversible by said board) said corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. Nothing herein contained shall be construed to authorize the abandonment of that portion of a railroad which has been constructed and operated.” (Appendix to Brief, p. 18.)

Upon the adoption of the new General Railroad Law on June 7th, 1890 (*Laws 1890, Chap. 565*), the provisions of the act of 1889 above quoted were embodied therein, substantially without change, as Section 83 (Appendix to Brief, p. 23).

Availing itself of the relief afforded by this Statute, the Adirondack Railway Company in April, 1892, made application to the Board of Railroad Commissioners for a certificate relieving it from the obligation or necessity of then completing the extension of its said line; and on May 9th, 1892, the Board issued its certificate certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road beyond the portion thereof constructed at the time the company acquired title to said railroad property and franchises, namely, beyond North Creek in Warren County (Record, p. 19; this deposition read in evidence, p. 72 of the record).

It thus appears that in 1896 and 1897 when,—the conditions having materially changed and it being then of manifest interest to the public as well as to the railroad that the line should be extended (Record, pp. 19-21, 15-16; see also p. 72),—the plaintiff-in-error made its surveys, acquired by purchase sundry portions of its right of way and prepared to acquire other portions by condemnation, *it possessed intact all the rights, franchises, grants and privileges incident to the construction, maintenance and operation of its line beyond North Creek that the old Adirondack Company had possessed at the time of the foreclosure sale*; and that in so far as any of those franchises and grants partook, prior to foreclosure, of the nature of a binding contract between the State and the Adirondack Company, they were just as binding in 1897 between the State and this plaintiff in error. This proposition will be discussed at length under its proper head in the Argument; suffice it here to say that in our opinion the company was clearly vested with an absolute right granted by the State and binding upon the State with all the obligatory force of a contract, to construct and operate its railroad from North Creek, which it had already reached, to a point in the Town of Newcomb, Essex County, and thence to a point on the River St. Lawrence in the Town of

Oswegatchie; and was further vested with the right of acquiring by eminent domain, such lands as might be necessary therefor.

It was shown in the evidence above referred to and without dispute that by constructing as far as Long Lake in Hamilton County,—a distance of approximately forty miles,—the line could there connect with a new and continuous line of railway coming down from the North whereby direct communication could be had with Ogdensburgh, and by means of a new international railway bridge across the St. Lawrence River constructed under Act of Congress and a new line of railway connecting therewith in Canada, the City of Ottawa would be directly connected with tide water at the Hudson by a route which not only would be shorter by fifty or sixty miles than any existing line, but would also have the immeasurable advantage of being readily able to cross the St. Lawrence at all seasons and thereby avoid the delays and dangers incident to the flow of ice affecting the ferry from Ogdensburgh to Prescott.

The *procedure* whereby the plaintiff in error could exercise this vested right of acquiring its right of way, in the construction of its line beyond North Creek, was of course in the discretion of the legislature, and could be changed by the legislature from time to time under its reserved powers. We therefore look at the law as it existed in 1896 and 1897, when the plaintiff in error proceeded to exercise such right, and find it in the General Railroad Law of 1890 (Appendix to Brief, pp. 20-23).

Section 6 of that act reads:

“Every railroad corporation, except a street surface railroad corporation and an elevated railway corporation, before constructing any part of its road in any county named in its certificate of incorporation, or instituting any proceedings for the condemnation of real property therein, shall make a map and profile of the route adopted by it in such county, certified by the president and engineer of the corporation, or a majority of the directors, and file it in the office of the clerk of the county in which the road is to be made. The corporation shall give written notice to all actual occupants of the lands over which the route of the road is so designated, and which has not been purchased by or given to it, of the time and place such map or profile

were filed, and that such route passes over the lands of such occupants." (Appendix to Brief, pp. 20-22.)

The Statute then provides that from and after the service of such notice upon the occupants, *the hands of the railroad company shall be completely tied for a period of fifteen days.* It can do nothing during that time to perfect or hasten its acquisition of title. During such period the occupant or owner may, if he so desires, petition the Court for an alteration of the route adopted by the railroad company as shown on its map so filed, and in case any such proceeding be brought, further action by the company is deferred until final order be entered in that proceeding. The fifteen day period is imposed by statute for the exclusive benefit of the owner, and if he does not therein move to change the location of the road, the line shown on the map becomes at the expiration of said fifteen days a fixed and located line. Up to that time it had been located but with the possibility of the location being changed; after that the location becomes certain. What was intangible before, not as to the existence of the *right* to take the land but as to the precise land to be taken, then becomes tangible and fixed in every respect.

The fifteen day period is not given to enable the land owner to *defeat* the right of the company but to permit him to reduce, if he can, the hardship of the taking. See

People ex rel. Erie R. R. v. Tubbs (59 Barb., 401, 407),

where it is said:

"This proceeding was obviously designed, not to put it in the power of a few individuals to obstruct and defeat the construction of railroads, but to give a remedy to a land-holder who might sustain some extraordinary or peculiar injury from the proposed location, not common to other lands through which the proposed route lay, which could not be adequately compensated in damages, and which might be prevented and avoided by a change upon the land consistently with the just rights of both parties, and of the public."

This also appears from the following language used further on in the same section of the Railroad Law last quoted:

"But no alteration of the route shall be made except

by the concurrence of the commissioner who is a practical civil engineer, nor which will cause greater damage or injury to lands, or materially greater length of road than the route designated by the corporation, *nor which shall substantially change the general line adopted by the corporation.*"

It is apparent, therefore, that this provision of the Statute for the benefit of the land owner was never intended to and that it cannot be held to qualify or limit in any way the *right* of the company to take the land required for the purposes of its incorporation.

That the legislature further intended to give to railroad companies the absolute *right* to locate the line of their roads over such routes between their stated termini as they might select, and to acquire title to the lands over which such located routes might pass, is apparent from Sections 13 and 28 of the railroad act of 1850.

Section 13 reads:

"In case any company formed under this act is unable to agree for the purchase of any real estate required for the purposes of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act." (See Appendix to Brief, p. 5.)

And Section 28 provides that in addition to the general powers conferred on corporations by Chapter XVIII., Title 3, of the Revised Statutes (see Appendix to Brief, p. 3), each corporation formed under the provisions of said railroad act should have power:

"1. To cause such examination and surveys for its proposed railroad to be made, as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto;" and
 * * * *

"4. To lay out its road not exceeding six rods in width, and to construct the same; and for the purposes of cuttings and embankments, to take as much more land as may be

necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this act for lands taken for the use of the company." (Appendix to Brief, p. 6.)

The Adirondack Company, it will be recalled, was incorporated with these rights *going to the very essence of the purposes for which it was incorporated*, and all such rights were acquired by the plaintiff in error herein upon its formation in 1882.

The provisions of the act of 1850 above quoted were embodied in the Railroad Law of 1890, without material change, as Sections 7 and 4 thereof, respectively (Appendix to Brief, pp. 23, 20).

Upon the expiration of the fifteen day period,—and it was admitted on the trial herein that no application to change the route across Township 15 adopted by the plaintiff in error has ever been made by owner or by occupant or otherwise (Record, p. 64),—the railroad company's right to condemn,—*right of action*, if you please,—was complete, and it could then proceed to acquire title by condemnation in the manner pointed out by Statute. Until 1890, when the so-called "Condemnation Law" was enacted (*Laws 1890, Chap. 95*) the procedure for the condemnation by a railroad of its right of way was found in Sections 14-18 of the railroad act of 1850, and in the sundry acts amendatory thereof. In 1890, however, and upon the enactment of a new general Railroad Law, those provisions were inserted without substantial change in a separate act entitled the Condemnation Law, which act was also added as a new and distinct chapter to the then existing Code of Civil Procedure. There was substantially no change made in the procedure for condemnation, but simply a reclassification of the subject under two heads instead of one. The emphasis, consequently, placed by the learned judge writing the opinion at the Court of Appeals upon the fact that the proceedings for filing the map and giving notice to occupants were authorized by the Railroad Law whereas proceedings for the acquisition of title by condemnation were authorized by the Code of Civil Procedure, does not seem to have been well considered (Record, p. 104).

While we have printed in the Appendix to our Brief the more important provisions of the general condemnation law of 1890, we wish to point out that such provisions have no bearing whatsoever on the questions involved. We do not claim and we have never claimed that our right to defeat this action brought by the State rests in any particular upon the time when we began our *condemnation proceedings*, or upon any question of priority on October 7th, 1897, between the commencement of our condemnation proceedings and the condemnation by the State under the Act of 1897. Upon the trial at Special Term before Justice CHESTER when a witness for the plaintiffs testified to what we knew was untrue, namely, as to the hour when the State filed and served its certificate of seizure under the Act of 1897, we naturally introduced evidence to show the true hour; but so far from regarding such issue as at all material, we conceded in our argument and in our brief at Special Term, in our argument and brief at Appellate Division and in our argument and brief in the Court of Appeals, and we state here with all the clearness and emphasis of which we are capable,—that the time when we began our *condemnation proceedings* of the strip across Township 15 has absolutely no bearing of any kind upon the questions involved on this appeal. We stand or fall upon our rights as they were at daybreak of October 7th, 1897; and the State does not claim to have filed or served its certificate of seizure prior to 11:50 that morning (Record, p. 55). We say at daybreak, because the rights we assert were complete upon the expiration of fifteen days after the filing of the maps and giving notice thereof to the occupants, and such fifteen day period expired with midnight of October 6th, 1897. Lest we be misunderstood, however, we add here further that our rights were indestructible by the State even before the expiration of that period; but of this more under its proper head in the argument.

Such conflict of testimony as to the hour of the State's action,—whether it acted at 11:50 a. m. or at 12:45 p. m.,—was substantially the only conflict in the evidence. We naturally do not ask this Court to regard it; we have never founded any right in any of the courts upon a determination of such conflict in our favor; and we raise no question as to the propriety of Judge VANN's assumption at the middle of page 97 of the Record that "the condemnation proceedings instituted by the forest pre-

serve board were fully completed as required by the statute of 1897 before "any *condemnation proceedings* were commenced by the plaintiff in error, although the formality with which the learned judge has announced such assumption might, without the above explanation, have possibly led this Court into regarding the assumption as weighing most heavily against the railway company's contention as to its rights.

Now what are the detailed facts established by the evidence?

Township 15, Totten & Crossfield's Purchase, lies at the point of contact of Warren, Hamilton and Essex Counties, a portion of said township lying in each of said counties (Record, p. 17; see also p. 72).

Between September 1st, 1896, and June 1st, 1897, the plaintiff in error caused a survey to be made (Record, pp. 16, 72) preparatory to the construction of its line from North Creek to the town of Newcomb in Essex County and thence to the outlet at the northern extremity of Long Lake in Hamilton County, where connections could be made with the new line of railway being constructed from the north as hereinbefore referred to (Record, pp. 15-17). The region is mountainous, and the course of the route as adopted was necessarily a winding one. A portion of such route crosses Township 15, and enters into each of said three counties within the limits of said Township. The lands are wild lands, no portion of the route adopted in said township being under cultivation (Record, p. 17); and there was no "actual occupant" thereof within the meaning of the Statute.

It also acquired by purchase,—a very material fact quite overlooked by the learned Court below (Record, p. 165),—portions of its said right of way in other townships over which its route as adopted passes (Record, pp. 18, 21; see also 72), and sought to acquire from the owners, by purchase, its right of way over Township 15 also (Record, p. 14).

It thus appears affirmatively that relying upon its vested right or franchise, acquired by an accepted grant from the State, to carry out the very purposes of its incorporation and construct its line to Newcomb in Essex County and thence to Long Lake on the way to Ogdensburg, the plaintiff in error ex-

pended divers sums of money in making a survey and in *purchasing* rights of way wherever it could do so. This fact was established by competent proof and was unquestioned; and the assumption by the learned Court below, in the face of such evidence, that the plaintiff in error had taken no action and expended no money to extend its road when the State acted (Record, p. 102), had done nothing beyond filing a map and profile and serving notice thereof on the occupants (Record, p. 105), was an error of law most material in its bearing, and has been specially assigned as error to this Court (See 8th Assignment of Error, p. 109).

Failing in its efforts to acquire its right of way across Township 15 by purchase, the plaintiff in error caused to be filed in the office of the clerk of each of said counties on *September 18th, 1897*, a map and profile of its route so adopted, duly certified as required by statute (Record, p. 14), and at once proceeded to serve notice upon the *owners*,—although it might well be urged that as there were no “occupants” whatsoever of the wild land of which said township consists, the plaintiff in error was wholly freed from any statutory obligation to serve notice of filing upon anyone.

The owners were served as follows (Record, p. 65):

On September 21st: *McGinn* (owning an undivided *fourth* part of said township;—Record p. 46);
D. J. Finch (owning an undivided *eighth* part thereof;—Record, p. 47);

On September 23rd: *Ashley* (owning an undivided *fourth* part thereof;—Record, p. 46);
Hitchcock (owning an undivided *eighth* part thereof;—Record, p. 45); and

On October 1st: *J. W. Finch* (owning the remaining undivided *fourth* part thereof;—Record, p. 45).

The fifteen day period was thus set running on September 21st, and consequently expired at midnight on October 6th.

The evidence shows that notices of filing were at the same time served on the Glens Falls Paper Mill Company and on the

Indian River Company (Record, p. 65); but it also showed that prior to October 7th, 1897, no actual delivery had been made of any deed from these owners, all the deeds having been executed for the purposes of effecting a sale of the entire township to the State by a conveyance thereof from the Indian River Company, and were to be delivered only when that sale was accomplished.

Mr. Ashley who prepared the deeds testified that he placed them in the custody of Mr. Allds, the attorney for the Forest Preserve Board, on October 4th (Record, p. 69), while Mr. Allds testified that they were placed in his keeping by Mr. Ashley on September 14th (Record, p. 54); but the date is absolutely immaterial, for it was not until October 7th, that the sale went through, the deeds having in the meantime remained in a pigeon hole (Record, p. 53).

On September 30th, and while the fifteen days were still running, plaintiff in error learned of the intended transfer to the State of the entire township, as well as of a large part of Township 32. Fearing the constitutional provision above quoted might be construed as forever precluding the construction of its line and conceiving that it must act quickly in the protection of its rights, it brought suit against the Indian River Company, and the owners above named, and obtained therein a preliminary injunction restraining such owners from making a transfer of Township 15 except such conveyance be expressly made and received subject to the right of way thereover of the route so located. Such preliminary injunction and the papers whereon it was made will be found at pages 8-14 of the Record.

The defendants in said suit moved on October 4th, to vacate the injunction on the papers whereon it was made; but Justice McLAUGHLIN denied such motion. His opinion will be found at pages 27-28 of the Record.

Under leave granted, additional affidavits both in support and in opposition to the continuance of the injunction *pendente lite* were filed (Record, pp. 15-24), and on October 16th, the hearing upon return of the order to show cause came on, and an order was then made by Mr. Justice KELLOGG continuing the injunction. He wrote no opinion, but the order will be found at pages 25-26 of the Record.

The Indian River Company appealed to the Appellate Division (Record, p. 26), which on March 2nd, 1898, reversed the order appealed from and vacated the injunction (Record, pp. 60-61). An opinion was written by Mr. Justice HERRICK in which he read for reversal on two grounds: (1) that the injunction was in effect an obstruction to the State's exercise of its right of eminent domain; and (2) that if the railroad company was vested with the rights it claimed it did not need an injunction to protect them, whereas if it was *not* vested with such rights it certainly was not entitled to an injunction. The Court unanimously concurred with Justice HERRICK for reversal; but the majority expressly limited its concurrence to the ground last stated (Record, p. 76). Justice HERRICK's opinion is reported in *27 App. Div., 326.*

In the meantime, and in anticipation of the refusal of Justice McLAUGHLIN to vacate the preliminary injunction upon the hearing of October 4th, the Indian River Company on October 2nd executed to the State a deed of a specified portion of Township 32 and of all of Township 15, *excepting and reserving therefrom, however, the six-rod strip over which this plaintiff in error had located its route.* Such deed was marked *Exhibit 13*, and will be found at pages 52-53 of the Record.

On the same day it executed to the State another deed in all things identical with the first, except that there was no exception of or reference therein to the six-rod strip. This deed was marked *Exhibit 14* (Record, p. 53).

Of course the State acquired no interest in the six rod strip through *Exhibit 13*, for such strip was expressly excepted from the grant therein contained (Record, p. 53). It is therefore immaterial when *Exhibit 13* was delivered, although it is very clear from the evidence that there was neither delivery nor acceptance of such deed until October 7th (Record, pp. 53, 54, 65).

As to *Exhibit 14*, the only instrument under which the State can claim to have acquired title to the strip by voluntary grant, the evidence is as follows (Testimony of Mr. Allds, attorney for the forest preserve board):

"I first saw *Exhibit 14* on October 2nd. That was to

be held subject to the direction of the Court. * * * It was handed to me to be recorded if the Court should permit the same at the end of the proceedings which were then pending. *Yes, that was on the 7th of October.* The deed remained in my possession until some time in April, 1898." (Record, p. 53.)

See also the proceedings of the forest preserve board at its meeting of October 7th when, because of the court's refusal to vacate the injunction, it accepted a delivery of *Exhibit 13* and directed a *seizure* under the Act of 1897 of the six rod strip (Record, p. 65).

The State must thus justify its claim of exclusive title to the six-rod strip, by the act of 1897 and the proceedings had thereunder. It concedes that any grant of said strip made after the *lis pendens* were filed in our condemnation proceedings conferred a title upon the grantee subject to our rights; and there is no dispute but that the *lis pendens* was filed in the first proceeding in each county on October 7th, 1897 (Record, pp. 63-64). As no delivery was made to the State of *Exhibit 14* until the month of April, 1898,—which was subsequent even to the judgment of condemnation in each proceeding,—any claim by the State of an exclusive title by voluntary grant may be regarded as disposed of, and will not be considered further in this brief.

Now what are the material features of the Act of 1897 (Appendix to Brief, pp. 49-55):—

By §1 the Forest Preserve Board was appointed.

By §2 its duty was declared to be and it was authorized to acquire for the State by purchase or otherwise such "land, structures or waters" within the limits of the Adirondack Park as it might deem advisable for the interests of the State.

By §3 the Board was authorized to enter upon and take possession of any land, structures or waters within the limits of such park, the appropriation of which in its judgment should be necessary for the purposes of a park or for the purposes specified in Article 7, Section 7, of the Constitution.

By §4 it was provided that when the Board shall have determined to seize, or as the act expresses it "appropriate," land,

the State Engineer shall furnish it with an accurate description of the land so to be appropriated, certified by him to be correct; that a majority of the board shall endorse on such description a certificate setting forth that the lands described therein have been appropriated by the State for the purpose of making them a part of the Adirondack Park; that such description and certificate shall thereupon be filed in the office of the Secretary of State; and that the board shall then serve "on the owner of any real property so appropriated" a notice setting forth the fact of such filing, the date of filing and a general description of the "real property *belonging to such owner* which has been so appropriated." The act then reads as follows:

"From the time of such service, the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be *conclusive* evidence of an entry and appropriation by the State."

By §5 the forest preserve board is given power to agree with the owners for the value of the land so taken and as to the amount of damage resulting therefrom, and provides for the payment of the sum so agreed upon.

By §6, if an agreement as provided in the last section cannot be reached, "*such owner*, within two years after the service upon him of the notice of appropriation" may go into the Court of Claims and litigate,—*what?* Simply the question of the value of the land taken and the amount of damage sustained by him by reason of the taking. And jurisdiction is conferred upon the Court of Claims to entertain such question and such question only. The section then provides for the payment to such litigant or claimant of any judgment rendered by the Court of Claims.

§§7-9 (which seem to us to be in direct conflict with the provisions of Article 7 of Section 7 of the Constitution which provides that no timber on lands acquired by the State within the limits of the Adirondack Park shall be "removed or destroyed") give to the owner an option, to be exercised within six months after the service upon him by the forest preserve board

of notice of the appropriation of his lands, of reserving and removing therefrom certain specified kinds of timber; but as the rights of the plaintiff in error are not affected by these provisions, we make no further comment upon their validity.

By §19 it is provided that if, upon the rendition of any judgment by the Court of Claims "it appears that there is any lien or incumbrance upon the property so appropriated," the amount of such lien shall be stated in the judgment and, in the discretion of the comptroller, the amount awarded by the judgment may be deposited in a bank to be distributed to such persons as the judgment may direct.

The foregoing are the material provisions of the act under which the State of New York justifies its attempted destruction of our property rights. *It is to be observed that no provision is anywhere made in the act whereby a citizen whose property is seized, can test, either before or after the seizure, the lawfulness thereof.* The State is sovereign and can be sued only by her own gracious permission; and that permission is not granted by the terms of the act, or in any other way.

Now, how did the State officials seek to employ the provisions of such act for the purpose of destroying our right of way? It was not a question with them of getting the land, but of *cutting off or destroying our right to construct, maintain and operate a railroad thereover.* All the rest of Township 15 (as well as the agreed portion of Township 32) was theirs upon the delivery on October 7th of the deed *Exhibit 13* (Record, pp. 52-53); and the excepted portion had been included in the deed, *Exhibit 14*, which was deposited the same day in escrow to be delivered to the State when and if the owners could lawfully make a delivery thereof (Record, p. 53). The owners had thus done all in their power to vest title to the strip in the State, and could no longer make any disposition thereof.

The officials, and through them the State, had actual knowledge of the proceedings theretofore taken by the plaintiff in error as hereinbefore recited (Record, p. 56). See particularly the minutes of the meetings of the forest preserve board of October 1st and October 7th, 1897 (Record, pp. 59-60, 64-65). These minutes, and particularly those of the meeting of Octo-

ber 7th (Record, pp. 64-65), show that the forest preserve board, and therefore the State, sought deliberately and wilfully to ignore the existence of any right in plaintiff in error to construct its road across said township, although the fifteen day limit had fully expired; and they sought to extinguish such property right without notice to the railroad, without compensation therefor, and by the service of the notice contemplated by the Act of 1897 upon the *Indian River Company*, in which corporation the fractional parts of ownership theretofore vesting in the sundry individuals named above had at some time subsequently to October 1st been collected. The description, certificate of seizure, proof of filing, notice and proof of service thereof on the president of the Indian River Company will be found at pages 48-51 of the Record.

If this proceeding were effective, as defendants in error claim it was, to prevent the plaintiff in error from ever constructing its right of way across Township 15, then the effect of it is to deny to plaintiff in error the right to build its line anywhere north of the southerly boundary of said township, and to prevent its reaching Newcomb in the County of Essex, or to extend its line to the St. Lawrence River; for the law which would hold that it had lost its right to cross Township 15 because title thereto was vested in the State and under the provisions of Section 7 of Article 7 of the Constitution could not be taken by any corporation but must forever remain wild forest lands, would apply with equal if not greater force to any other lands already owned by the State within the limits of the Adirondack Park. The evidence shows, without having been ever questioned, that the acquisition by the deed *Exhibit 13* of title to Township 15 (except the six-rod strip) and of Township 32, completed a continuous band of State land across that part of the Adirondack region, and left as the only possible territory whereon the plaintiff in error *could* avail itself of its right to construct to Newcomb and thence to Long Lake, the six-rod strip which was the subject of the attempted seizure by the State; and that if *that* were taken away from it further construction would be impossible (Record, pp. 17-18).

Of course we do not deny that the State could take from us our vested right to cross said township through a lawful exercise

of its sovereign power of eminent domain to condemn such right, and upon the making to us of just compensation therefor; but we do insist that until she does so condemn such right, not only the Act of 1897 but even the provisions of Article 7 of Section 7 of the Constitution are subordinate thereto, and that merely condemning the strip as against the Indian River Company could not lawfully affect in any way whatever our right to cross it.

The plaintiff in error has never swerved from the above stated view of its rights. On October 7th,—subsequently, if you please, to the attempted seizure by the State,—it instituted proceedings in each of the three counties to condemn its right of way across said township. It made the Indian River Company and the owners parties defendant thereto, and did not make the State a defendant, chiefly because it could not proceed against the sovereign, and for the reason almost as cogent that even if the Act of 1897 were a valid enactment, the State had acquired title to the strip only subject to the railroad company's rights. The State, however, was cognizant of and in the name of the owners took part in the defence of those condemnation proceedings up to a certain point. It assisted in the preparation of the answer to the petition for condemnation (Record, p. 66); attended at court on the return day thereof through its attorney, conceded to be acting at the instance of the forest preserve board (Record, p. 56); requested of counsel and obtained a consent to the adjournment of those proceedings (Record, p. 56); and wrote its approval of a still further adjournment. (See *Defendants' Exhibit A*, Record, p. 70; cf. also p. 57.)

The proceedings were regularly adjourned from time to time (Record, p. 70) and finally resulted on March 12th, 1898, in judgments of condemnation in each county (Record, pp. 61-64). Those judgments were entered in each of the three counties on the 18th of March, 1898, and the meeting of the commissioners therein appointed to ascertain and fix the compensation due the owners was set for March 25th, 1898 (Record, pp. 61-63).

This action was commenced on March 25th, 1898, (Record, p. 4), with a preliminary injunction accompanying the service of the summons and complaint.

Specification of Errors.

The principal errors of which we complain, as must be apparent from a perusal of the foregoing statement, are those which uphold the validity of the condemnation features of the Act of 1897, and give such effect to the proceedings had thereunder as to deprive this plaintiff in error of a valuable property right without notice, without opportunity to be heard and without compensation. The errors asserted and intended to be urged may be stated thus:

1. That the condemnation features of the Act of 1897 are in any aspect unconstitutional and void, in that they authorize the taking of private property for an alleged public use and at the same time deny to the owner any and all opportunity of testing the nature of the use or the lawfulness of the taking. (See Assignment of Errors No. III., Record, p. 108.)
2. That even if said condemnation features be otherwise valid, and are properly construed, as they were construed by the court below, as conferring any authority whatsoever upon the State to acquire by the proceedings had thereunder against the Indian River Company, a valid title to said six rod strip exclusive of the right of this plaintiff in error to construct, maintain and operate its railroad thereover, they are unconstitutional and void in that they authorize the taking from this plaintiff in error of its vested property right so to construct, maintain and operate its railroad, without any notice whatsoever or opportunity to be heard and without the making of any compensation therefor. (See Assignment of Errors Nos. III, V, VI, IX and X, Record, pp. 108-110.)
3. That even if the condemnation features of said act be otherwise valid, and are properly construed, as the Court below construed them, as conferring any authority whatsoever upon the State to withhold, withdraw or obstruct, by virtue of the proceedings had thereunder against the Indian River Company, the vested right of this plaintiff in error to construct, maintain and operate its road over said six rod strip, they are unconstitutional and void in that they impair the obligation of an existing contract between

the State and this plaintiff in error. (See Assignment of Errors, Nos. IV, VII and X, Record, pp. 108-109.)

Other errors which we urge upon the attention of this Court are:

4. That there was no sufficient or indeed any competent evidence to warrant the Court below in holding that at any time on or prior to October 7th, 1897, the State had acquired or then held any *equitable* ownership of or interest in the six rod strip across Township 15. (See Assignment of Error No. 1, Record, p. 108.)

5. That the Court below erred in its assumption that the plaintiff in error had done nothing to extend its line beyond North Creek, except to file a map and profile of the route it adopted, and to serve notice thereof on the occupants; for it appeared by competent and unquestioned evidence that the plaintiff in error had on the faith of its franchise or vested right so to extend its line, expended divers sums of money in making surveys and in acquiring rights of way by purchase along other parts of such extension. (See Assignment of Error No. VIII, Record, p. 109.)

6. That the Court below erred in assuming, what it in effect assumed, that the State of New York as grantee under a voluntary grant of said six rod strip could and did acquire any greater estate or larger interest therein than the grantor had at the time of making such grant. (See Assignment of Errors No. II, Record, p. 108.)

7. That the Court below erred in reversing the order of the Appellate Division appealed from. It should have affirmed said order and, on the stipulation for judgment absolute given by the defendants in error on taking such appeal, should have directed final judgment to be entered in this action in favor of this plaintiff in error. (See Assignment of Errors No. XI, Record, p. 110.)

ARGUMENT.**I.****The claim of an equitable ownership in the State of the six-rod strip is unfounded.**

Learned counsel for defendants in error seeks to make out what he calls an *equitable* title thus wise:

On August 6th, 1897, the forest preserve board adopted a resolution accepting an offer, stated therein to have been made by a Mr. McEchron and others, to sell to the State Township 15 and a part of the adjacent Township 32 (Record, pp. 5-6, 31); in the same month, and following that resolution, an engineer from the State Engineer's office made some surveys in the Township, cut some brush and drove some stakes (Record, pp. 57-58); and in November, 1897, the State paid for the land (Record, p. 33). *This*, he says, establishes an equitable title in the State from August 6th. We submit that the facts do not sustain such claim.

First.—No proof was given either showing or tending to show that the offer to sell was in writing. Yet, unless it was, it was of no validity as to the land. Under the Real Property Law of New York, then in force (Appendix to Brief, p. 27), it is provided:

“An estate or interest in real property other than a lease for a term not exceeding one year, or any trust or power * * * cannot be created, granted, assigned, surrendered or declared unless by act or operation of law or by a deed or conveyance in writing subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.” * * *

It cannot be *presumed* that the offer was in writing in the absence of proof. So, as the case stands, no offer was made that granted any estate or interest in this Township; and the acceptance of an *oral* offer could not vest in the State any interest in the lands embraced in the resolution of acceptance.

Second.—The parties who made the offer did not own Township 15 at the time thereof, and one of them at least at no time afterwards became vested with any title thereto. It is apparent that McEchron and Ashley were the ones making the offer. "That said Ashley and McEchron did not own all of the above lands," is alleged in the Complaint (Record, p. 6). McEchron, it appeared, never owned any part of Township 15. See his testimony:

"Q. And were you also one of the owners of an interest in Township 15? A. Not until the Indian River Company bought Township 15" (Record, p. 68).

It was shown in the Statement of Facts in the foregoing part of this brief who the owners of the Township were. The offer consequently was made by persons who did not own what they offered to sell; and it is somewhat difficult to understand how, by such an offer, the State acquired any interest in this Township. From this it would seem that the learned Justice dissenting in the Appellate Division fell into error in assuming the existence of a contract to purchase this land before the map of the plaintiff in error was filed (Record, p. 80). It is very evident that no contract at that time existed which gave to the State any right to or interest in any part of Township 15.

Third.—The only evidence given as to the pretended *possession*, is the testimony of the surveyor, Mr. Morss, at pages 57-58 of the Record. It is perfectly manifest from this, however, that his going upon the lands was solely for the purpose of computation as to the estimated cost of the proposed dam, inasmuch as the amount to be paid by the State for the entire Township depended upon such cost (Record, p. 6).

Had nothing been done after the return of Mr. Morss' surveying party, no title to and no interest in the township would have been acquired by the State, and none of the owners were in any way bound to convey to the State. This really seems too elementary to urge upon this Court.

Fourth.—The payment for the land on November 11th was not in the assertion of an equitable title, but was based upon the title by deed. (See minutes of Board meetings of October 1st and 7th, Record, pp. 59, 65.)

Fifth.—In any event, defendants in error never claimed until the trial to have gone into *possession* until after the payment of the purchase price in November. See the verified Complaint, where in connection with the allegation of payment is the following significant statement:

“ And *thereupon* ” (that is upon the payment) “ the plaintiffs through their State Engineer and surveyor and forest force *entered into possession of said lands.* ” (Record, pp. 6-7.)

This claim of possession *prior* to the filing of the railway maps and service of notice, was not in the minds of the pleader and of the engineer who verified the complaint when the action was commenced. Counsel merely hopes that by some shadowy claim of possession under a shadowy claim of contract to sell, some kind of an *equitable* title may be spelled out which will give him some kind of a right by voluntary grant upon which he may stand, in case his title by condemnation falls. The learned Justice dissenting at Appellate Division was misled; but the contention is so manifestly untenable that further discussion would seem unnecessary. Suffice it to say that in the case of

Dodge v. Gallatin (130 N. Y., 117, 124-129),

upon which counsel relies below, the Court found an *actual possession* under equities which the party in possession could enforce. It therefore held that an equitable title was made out which would pass by a devise under the Statute, *32 Henry VIII, Chap. 1*, which statute controlled the matter of devises in New York until the enactment of the revised statutes of 1830.

In the case at bar the State has shown neither possession nor equities at any time prior to October 7th, 1897.

II.

The issues involved are concise and clean cut.

The learned Justice dissenting at Appellate Division and the learned Judge writing in the Court of Appeals included within their opinions such a variety of propositions that a reader might readily wonder what the issues presented by this plaintiff in error really were. In order, therefore, that no misapprehension may arise in this court as to our contentions, we respectfully state:

(1.) That we never argued, suggested or believed that "due process of law" must *always* involve a judicial proceeding and that there can *never* be due process unless a hearing be had in a court of justice. We simply urged that in the exercise of the sovereign right of eminent domain, especially where all occasion for arbitrary action is wanting, due process require that the owner whose property is taken shall at some time, in some way, and before some tribunal authorized by the State to hear him, have an opportunity to contest the presumed legality of the taking of the particular property seized; and we insisted that in this particular sovereign New York stands in no different position from any private or municipal corporation to which she has delegated the right to exercise such sovereign power.

(2.) We have always conceded that the sovereign powers of eminent domain, taxation, police power, etc., are inherent to government, as such, and are as enduring and indestructible as the State itself; nor have we ever contended that they were conferred upon the State by the Constitution, or were reserved to the State therein. At all times have we concurred in the proposition as stated by the learned Judge of the Court of Appeals that while these powers may be limited and regulated by the Constitution, they nevertheless *exist* independently of it as a necessary attribute of sovereignty. Our fundamental difference with the learned Judge was as to the extent of those constitutional limitations. He holds that there is no limitation which secures to the citizen an opportunity to be heard (except of course as to the amount of compensation) when sovereign New York exercises the right. We insist, on the other hand, that

the provisions of Section 6 of Article 1 of the State Constitution, providing that no person shall be deprived of life, liberty or property without due process of law (See Appendix to Brief, p. 1), is such a limitation; and that to give to a legislative enactment of condemnation the *conclusive* effect which the learned Judge gives it, is to permit the usurpation by the legislature of certain judicial functions of government,—for example, the determination of whether the use is or is not a public one; or whether the actual taking is or is not within the terms of the enactment. And so the question comes around again what is due process of law in a taking by the State of New York under its sovereign power of eminent domain.

(3.) We have never doubted that all private property, both tangible and intangible, is held subject to the exercise of this right by the sovereign power, even that which may already be devoted to a public use. We have simply insisted that by exercising such right against the property of the Indian River Company, the State acquired only what the Indian River Company had, namely, the six-rod strip subject to our rights thereover. We denied that the State in this indirect way could accomplish what it was powerless to accomplish directly,—the taking of our property without making any compensation to us therefor.

(4.) We have never contended that the citizen can resist a lawful taking under an exercise of this sovereign right of eminent domain; but that is a very different thing from holding that the citizen shall never be heard on the question as to whether the taking is or is not lawful.

(5.) The suggestion has never been made in this case by either side that a due exercise of the right of eminent domain requires the payment of compensation in advance or even at the time of the taking. We have always conceded that in a taking by the sovereign, the legislature has full power to direct the time and mode of payment so long as just compensation be ultimately made.

One more thing may be said under this point. It seems to have been assumed by the Court below and has been intimated

in the argument of counsel, that the devotion of this six-rod strip to the uses of plaintiff-in-error's railway, is somehow going to interfere with the construction by the Indian River Company of this mammoth dam on State lands, which "shall be forever kept as wild forest lands," and whereon no timber shall be "removed or destroyed." We do not think from the standpoint of legal rights that it would be of the slightest materiality, even were this so. But it is not so. There is not a thing in the evidence to suggest it; and as a matter of fact the six-rod strip does not come within two-thirds of a mile of the outlet of Indian Lake where the dam is to be constructed; whereas the overflow of State lands caused by the raising of the water twenty-three feet (Record, p. 58),—lands upon which no timber shall be removed or *destroyed!*—will naturally occur on the lake side of the dam and to the westward and away from the six-rod strip. The evidence shows that the six-rod strip crosses sundry lots in said Township including lots 42, 31, and 18; that it then just touches lot 17, and runs at once to the northward across lot 7, which it leaves at the northerly bound of the Township (Record, p. 49). With this evidence before it the Court will judicially note that the outlet of Indian Lake is on the easterly boundary of lots 16 and 33 (being the westerly boundary of lots 17 and 32); and that consequently the existence of a railroad over this six-rod strip cannot possibly interfere with the devotion of State lands to the construction of this dam.

III.

The authority and right granted the old Adirondack Company under the Acts of 1863, 1865, etc., to construct the line of its road from some point in the Town of Hadley, up and along the valley of the upper Hudson to some point in the Town of Newcomb, and thence to a point on the St. Lawrence River in the Town of Oswegatchie, St. Lawrence County, upon its complying with the provisions of the railroad law, was a valid franchise or grant by the State, having all the obligatory force of a contract. Such franchise or grant was acquired through foreclosure by the plaintiff in error herein, and is a property right of value.

That the plaintiff in error acquired whatever franchise or right the old Adirondack Company possessed under these statutes, has been shown above. We have therefore to consider only the question as to whether the legislation referred to granted a mere license or privilege, revocable at the will of the legislature until actual construction was completed, or, on the other hand, was a *contract* between the State and the incorporators of the old company. We think both on reason and on authority it must be held that the State is bound as by a contract.

By the Act of 1863, Mr. Cheney and his associates were expressly authorized to incorporate a company under the general railroad act of 1850, *for the purpose of* constructing and operating a railroad along the valley of the upper Hudson into the wilderness in the northern part of the State. The act declared that when so organized the company should have all the rights and privileges given by the general railroad law of 1850 (Appendix to Brief, p. 28). One of those "rights and privileges" was to acquire by eminent domain a right of way over such lands as it might select in the counties and between the termini stated in its articles of association. That the State of

New York desired this company to be incorporated and this railroad to be built, is apparent from the title of the act:

“AN ACT to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness,” etc.

The State furthermore conferred upon the company certain privileges of mining and preparing for market the mineral resources of the wilderness, which it could not possess under the general law of 1850, and authorized it to acquire not exceeding one million acres of land and granted it exemption from taxes thereon for a period of twenty-five years (Appendix to Brief, p. 28).

Mr. Cheney and his associates accepted this grant from the State and filed articles of association under the general law in which were recited among other things the places from and to which the railroad should be constructed, maintained and operated, namely, from some point in the town of Hadley, “up “and along the valley of the upper Hudson to some point in “the town of Newcomb in the County of Essex” (Record, pp. 18, 72).

By the act of 1865 and other legislation set forth in the Appendix to this brief, the legislature recognized the route so adopted, and authorized the company to build further.

Can it be urged in the face of all this, that Mr. Cheney and his associates in accepting the provisions of such legislation, accepted only parts,—and if so, what parts,—thereof? If they accepted anything at all and acted upon the faith thereof, was it not in any event the right,—more than capacity,—*right* to construct the line of said road to Newcomb and thence to the St. Lawrence River? Of course such right could be exercised only in the manner pointed out by the general railroad law; but that made it none the less a *right*, and a valuable one, too.

On the faith of such right, stock was purchased and money expended in construction. Here was a contract between the State and the stockholders. In 1872, under power conferred by Section 28, subdivision 10 of the railroad law of 1850, the company executed a mortgage upon all its property, franchises, rights, etc., and bonds were issued thereunder (Record, p. 71).

Here was a contract between the State and the bondholders. The mortgage was subsequently foreclosed and the property, rights and franchises,—valuable, every one of them,—were sold and, pursuant to a statute so permitting, were acquired by the plaintiff in error. Here was a contract between the State and this plaintiff in error.

Is there any light in which it *can* be honestly urged that a grant by the State of a right to build, maintain and operate a railroad between two stated points, is not a valuable grant; or that when private individuals invest their money or give their time to the construction of any part of such a railroad and on the faith thereof, the grant does not possess all the binding features of a contract by the State?

Whether or not such grant is revocable under the reserved powers of the State will be considered below. We are contending here merely for the proposition that the franchise so to construct, maintain and operate was in itself a *contract* from which (except by an exercise of its reserved power,—and, as we shall show below, not even then,—) the State could not withdraw without the consent of the other party thereto. The State might condemn the franchise upon the making of just compensation; but violate it, ignore it, withdraw from it, obstruct it,—never.

Counsel below sought to draw a distinction between the franchise to exist as a corporation, and the franchises which an existing corporation might acquire by virtue of acts done after it had became a corporation. In his argument he limited the effect of an act of incorporation to an acquisition from the State of a franchise *to be* and an endowment of the artificial being, by the State, with certain mere *capacities* of doing something thereafter. But we submit this view is too narrow. In so far as an act creating a corporation bestows substantial rights, it is a *grant*, and in so far as it creates the artificial being and endows it with capacities, it is mere *law*.

In *Railroad Co. v. Georgia* (98 U. S., 365) this Court recognized that the word "franchise" was generic, covering all rights granted by the legislature, and held it too narrow a defi-

nition of such word to regard it as meaning only the right to be a corporation.

To same effect, see

Pierce v. Emery (32 N. H., 484).

In *Morgan v. Louisiana* (93 U. S., 217, 223) FIELD, J., speaking of statutory immunity from taxation, said:

"The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value. * * * They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

In *Hall v. Sullivan R. R.* (2 Redf. Amer. Ry. Cases, 612, 624), CURTIS, J., sitting at U. S. Circuit, said:

"The franchise to build, own and manage a railroad and to take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons."

These two cases were cited and approved in

New Orleans R. R. v. Delamore (114 U. S., 508).

See also

Salt Company v. East Saginaw (13 Wall., 378),

where Justice BRADLEY said:

"Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the State, and corresponding duties and obligations are assumed by the corporation."

See also

Farrington v. Tennessee (95 U. S., 683).

Georgia Pacific Co. v. Wilks (86 Ala., 482).

A leading case on this subject, if any be needed, is

Boston & Lowell Ry. v. Salem, &c., Ry. (2 Gray, 1),

where SHAW, C. J., in construing the charter of the plaintiff which authorized it to construct a railroad from Boston to Lowell, said:

“ In construing this act of incorporation, we are to bear in mind the time and circumstances under which it was made, but more especially to take into consideration every part and clause of the act and deduce from it the true meaning and intent of the parties. The act, like every act and charter of the same kind, is a contract between the government on the one part, and the undertakers accepting the act of incorporation on the other, and therefore what they both intended by the terms used, if we can ascertain it, forms the true construction of such contract. It conferred on the persons incorporated the franchise of being and acting as a corporation, *and the authority to locate, construct and finally complete a railroad at or near the city of Boston, thence to Lowell.* That this was regarded as a public improvement, and intended for the benefit of the public, is manifest from the whole tenor of the act, more especially from the authority to take property on paying a compensation in the usual manner, which would otherwise be wholly unjustifiable. It is equally manifest from the whole tenor of the act, and the nature of the subject, that the work would require a large outlay of capital.”

The learned Judge then referred to a subsequent provision in the charter, providing that no other railroad should be authorized within thirty years to be constructed from Boston to any point within five miles of Lowell, and continued:

“ The question is, does this provision confer any exclusive right, interest, franchise or benefit on this corporation? It is found in the same act, the whole is presented at once to the consideration of the incorporators, to be accepted or rejected as a whole, and this would of course constitute a consideration in their minds in determining whether to accept or reject the charter. If it adds anything to the value and benefit of the franchise, such enhanced value is part of the price which the public propose

to pay, and which the undertakers expect to receive as their compensation for furnishing such public improvement.

"This is a stipulation of some sort, a contract by one of the contracting parties to and with the other. * * * *It was made by government in its sovereign capacity, with subjects who were encouraged by it to advance their property for the benefit of the public.* It was certainly a stipulation on the part of the government regulating its own conduct and putting a restraint upon its own power to authorize any other railroad to be built," etc.

The true rule is perhaps most concisely stated in the words of Mr. Justice McLEAN in

Bank of Ohio v. Knoop (16 How., 369):

"Every valuable privilege given by the charter and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter."

And we cannot refrain from quoting from

Ohio v. Commercial Bank (10 Ohio, 335),

the very words quoted by Justice McLEAN in the *Knoop* case:

"A contract between the State and individuals is as obligatory as any other contract. Until a State is lost to all sense of justice and propriety, she will scrupulously abide by her contracts,—more scrupulously than she will exact their fulfilment by the opposite contracting party."

Counsel relied below upon a claimed application of the rule of

In re. Commrs. of Washington Park (56 N. Y., 144, 157).

In this case a motion was made by commissioners of appraisal to discontinue their proceedings, after the owners had been cited and were in court. The owners objected, and sundry English cases sustained their contention. RAPALLO, J., cited a line of New York cases:

Corporation v. Dover Street (18 Johns., 505);
In re. Beekman Street (20 id., 269);

In re. Canal Street (11 Wend., 154);
In re. Anthony Street (20 *id.*, 620);
Martin v. Mayor of Brooklyn (1 Hill., 545);
Corporation of New York v. Mapes (6 Johns. Ch., 49);
People v. Village of Brooklyn (1 Wend., 319);

as authority for the proposition, which was the only matter decided by the *Washington Park* case, that until final confirmation of the report of commissioners of appraisal, the owners of land taken for a public use have no vested interest in the *damages assessed or to be assessed*.

This, however, is a very different proposition from saying that the right of a corporation under legislative grant to acquire by exercise of the right of eminent domain, a right of way over lands between specified termini is in no sense a property right, and can be cut off by the legislature at will and without compensation.

It cannot be contended that the proceedings had by plaintiff in error under §83 of the Railroad Law, affected in any way the vitality of these franchises or rights. The contract with the State was that plaintiff in error should avail itself of the grant and complete the road within ten years from the filing of its articles of association on pain of forfeiting to the State its existence and powers (Appendix to Brief, p. 7). That was one of the conditions of the contract; and it was perfectly competent for the State to release the other party from the fulfilment of such condition, without in any way withdrawing its own grant, if it chose so to do. Section 83 left it to the judgment of the Railroad Commissioners to determine whether any railroad applying should be so released, and enacted that the certificate of the Railroad Commissioners should have that effect. That is all there is to it.

But even were it otherwise, the statute is not self-executing, and no ground of forfeiture has been judicially declared equivalent to office found.

See *Houston & Ry. v. Texas* (170 U. S., 260),

and cases cited.

IV.

Upon the expiration of fifteen days after the plaintiff in error had filed its maps and profiles and served notice of such filing upon the occupants of the land over which it had located its route,—no application having been made by any party to change such location,—it was vested with a completed right of action to condemn that land for the purposes of its right of way; and no transfer of such land to any person or to the State could free it from a liability to be so condemned.

It was in connection with this proposition that the Court of Appeals was obliged to recede from the unambiguous language of three former opinions which for years had been regarded as properly declaring the legal effect of a railroad company's filing its map and giving notice to the occupants, under section six of the Railroad Law (See Appendix to Brief, pp. 20-23).

The first of these cases was

Rochester & Hornellsville R. R. v. Erie Co. (110 N. Y., 128),

where the Court said:

“ When therefore a corporation has made and filed a map and survey of the line it intends to adopt for the construction of its road and has given the required notice to all persons affected by such construction, and no change of route is made as the result of any proceeding instituted by any land owner or occupant, in our judgment it has acquired the right to construct and operate a railroad upon such line exclusive in that respect as to all other railroad corporations, and free from the interference of any party. *By its proceedings it has impressed upon the lands a LIEN in favor of its right to construct, which ripens into title through purchase or condemnation proceedings.*”

This was followed and expressly approved in

The Suburban Rapid Transit case (128 N. Y., 510, 518),

where the Court, in speaking of the rapid transit act, said:

“The route, or routes, located are unalterable by the company, and I think the property over which the line of the route runs must be affected as fully for the purpose as it would be in a case where, under the General Railroad Act, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road and has given the required notice to all persons affected thereby. * * * In such a case we have held:”

Then follows what has already been quoted from the opinion in the *Hornellsville case* (110 N. Y., 128). Again, on page 519, following this quotation, the Court said:

“When the route or routes were located, upon which the railroad of the new corporation should be constructed, what other legal effect *could* follow except a subjection of the land affected to this species of public use, as through the exercise of paramount right? The subsequent purchase, or condemnation of the title to the lands, in the course of the railroad construction was merely incidental and was necessary in order to compensate property owners for the land taken, and to effect a transfer of the legal title.”

Again (p. 520): “To say that the right to appropriate the land on the designated routes for railroad uses was not vested, but merely inchoate, in my judgment would be a great misapprehension of the effect and value of formal proceedings conducted under legislative authority and direction, and of the formal consents of the public authorities to the projected line.”

The *Hornellsville case* was again referred to and the decision was approved in

Pocantico Water Works Co. v. Bird (130 N. Y., 249, 256).

It thus appears that upon these three occasions the Court of

Appeals had approved the proposition that: "*By its proceedings it has impressed upon the lands a LIEN in favor of its right to construct, which ripens into title through purchase or condemnation proceedings.*"

Justice HERRICK, in his dissenting opinion at Appellate Division, recognized the vice of these opinions in the fulness of their language (Record, p. 82), and pointed out that if the true construction of section six of the Railroad Law was to give to a railroad company which had done what was there set forth as being necessary to be done, a *lien* upon the land over which the route was located, then it must be held as established law that the legislature had conferred upon a corporation the right to take from a man, without notice and without compensation, the most valuable element of his property,—his right to dispose of it freely.

The learned judge of the Court of Appeals, perceiving the force of this reasoning, declared that the "so-called *lien*" was after all but "an exclusive right of one of two contending railroad corporations as against the other to build a road on a certain piece of land, or of a railroad corporation to hold land already condemned for a public use, as against a city seeking to condemn it for another public use, without special authority from the legislature" (Record, p. 105).

This is certainly a unique interpretation of the meaning of the word "lien," as previously used by the court, and completely ignores, we submit, the fact that after the expiration of the fifteen day period, the owner is powerless to change the location of the route, and that no transferee can move to change such location. The time to move, be there one owner or a series of owners, expires absolutely and forever and as against all subsequent owners, with the expiration of the fifteen day period. And so it is hardly a matter which affects merely the priority of right between "two contending railroad corporations."

Again the learned judge sought to save the language of the former decisions by likening the "so-called *lien*" acquired under section six of the Railroad Law, to the *lien* of a judgment on real estate. In either case it was only a "statutory *lien*," he said: and on the principle of what the Lord giveth He taketh away, the learned judge held it was perfectly competent for the

legislature to chop this "lien" off whenever it saw fit to do so. He declared that the "lien" was not in any event good as against the State, for the State could not be presumed by creating the defendant (plaintiff in error) and giving it the power of eminent domain, to have placed in its hands a weapon to be used against itself. "No argument," he declares, "is required to refute an absurdity" (Record, pp. 102-105).

In support of his proposition that the legislature has full right to terminate the "lien" recognized in the three former decisions as acquired under section six of the Railroad Law, he rests upon the case of

Watson v. N. Y. C. R. R. (47 N. Y., 157),

from which he makes long quotations. We ask the Court to read those quotations (Record, pp. 103-104), and indeed the whole opinion.

Assuming that the right acquired is a "lien,"—which we do not think it is,—we submit that the *Watson* case is not at all in point. It is an authority simply for the proposition that the legislature has the power to change a given *remedy*, so long as it does not take away all remedy or impair or destroy the *right*. It is distinguishable at once from the case at bar, where taking away the "statutory lien" upon the six-rod strip deprives the plaintiff in error for all time of its vested right to continue the construction of its line of railroad.

The distinction between an act which affects *merely* a remedy and one which destroys the very right itself, has been carefully preserved in a long line of decisions in this court.

In *Gunn v. Barry* (15 Wall., 610),

the facts were these:

Prior to 1861, the homestead exemption law of Georgia set apart 50 acres of land and 5 acres additional for each child of the debtor.

In 1866, plaintiff in error obtained judgment against one Hart for \$531. Hart then had 277 acres of land worth \$1,400, and Gunn's judgment constituted a lien on said land.

A new constitution was adopted in Georgia in 1868 and an act of the legislature was passed the same year, which fixed, as the homestead exemption, realty of the value of \$2,000.

Subsequently to the adoption of the constitution and the passage of this act, Gunn required defendant in error, as Sheriff, to levy on the 277 acres. He refused to do so on the ground that they had been set apart under the act of 1868; and Gunn then petitioned for mandamus. The courts of Georgia sustained the Sheriff.

SWAYNE, J.: "If the remedy is a part of the obligation of the contract, a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it *annihilates* the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact. * * *

"The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, *provided the change involve no impairment of a substantial right*. If the provision of the constitution or the legislative act of a State, fall within the category last mentioned, they are to that extent utterly void. They are for all the purposes of the contract which they impair, as if they had never existed."

Edwards v. Kearzey (96 U. S., 604)

was another homestead exemption case.

The act of 1859 of North Carolina set apart 50 acres. While that act was in force Kearzey became indebted to one Doe. On April 24th, 1868, the new constitution of North Carolina took effect which set apart real estate to be selected by the owner, not exceeding \$1,000 in value; and the legislature of the same year prescribed the method of setting apart the homestead. In January, October and December, 1868, three several judgments were obtained by Doe against Kearzey.

On January 22nd, 1869, the premises in question were set

apart to Kearzey as a homestead. He had no other real estate, and the value of that set apart did not exceed \$1,000.

On March 6th, 1869, the Sheriff sold the premises in execution to plaintiff in error. At that time the legislation of 1868 was in force and that of 1859 had been repealed.

Plaintiff sued to recover possession. The courts of North Carolina held that the property was protected by the act of 1868, and that the Sheriff's deed conveyed nothing.

SWAYNE, J.: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract as such, in the view of the law, ceases to be and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' * * *

"It is also the settled doctrine of this Court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement." Citing sundry cases.

CLIFFORD, J., wrote a concurring opinion: "Where an appropriate remedy exists for the enforcement of the contract at the time it was made, the State legislature cannot deprive the party of such a remedy, nor can the legislature append to the right such restrictions or conditions as to render its exercise ineffectual or unavailing. State legislatures may change existing remedies, and substitute others in their place; and if the new remedy is not unreasonable, and will enable the party to enforce his rights without new and burdensome restrictions, the party is bound to pursue the new remedy."

Justice CLIFFORD then discussed the effect of statutes in abolishing imprisonment for debt, requiring the recording of instruments, and shortening the statutes of limitation; and then said:

"Beyond all doubt, a State legislature may regulate all

such proceedings in its courts at its pleasure, subject only to the condition that *the new regulation shall not in any material respect impair the just rights of any party to a pre-existing contract.* * * * Mere remedy, it is agreed, may be altered at the will of the State legislature if the alteration is not of a character to impair the obligation of the contract; and it is properly conceded that the alteration, though it be of the remedy, *if it materially impairs the right of the party to enforce the contract,* is equally within the constitutional inhibition."

Justice HUNT also wrote a concurring opinion in which he quoted approvingly the words of DENIO, J., in

Morse v. Goold (11 N. Y., 281),

where he said :

"The question is whether the law which prevailed when the contract was made has been so far changed that there does not remain a substantial and reasonable mode of enforcing it in the ordinary and regular course of justice."

In

Planter's Bank v. Sharp (6 How., 301),

the Court said :

"It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, *provided no substantial right secured by the contract is thereby impaired.* No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution and to that extent void." Citing

Bronson v. Kinzie (1 How., 311).

McCracken v. Hayward (2 id., 608).

In

Green v. Biddle (8 Wheat., 1),

the Court said :

"It is no answer that the acts of Kentucky now in ques-

tion are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests."

In

Planter's Bank v. Sharp (6 How., 301),

the Court said :

"One of the tests that a contract has been impaired is that its *value* has by legislation been diminished. It is not, by the Constitution, to be impaired *at all*. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force."

In

Walker v. Whitehead (16 Wall., 314),

it appeared that a statute was enacted in Georgia in 1870, providing that no recovery could be had upon any debt accruing prior to June 1st, 1865, unless the plaintiff should first establish that all taxes chargeable on such debt had been paid. Plaintiff sued on a promissory note dated March 28th, 1864. The case was dismissed on the opening because plaintiff had not filed an affidavit showing payment of taxes. *Held*, this was a change in the remedy affecting the obligation of the contract.

SWAYNE, J.: "Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment. The *obligation* of the contract is the law which binds the parties to perform their agreement. *Any* impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution. The State may change the remedy provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract

in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, *including the substantial means of enforcement*, which existed when it was made."

To the same effect see words of Chief Justice WAITE in

Antoni v. Greenhow (107 U. S., 775),

and of Justice SHIRAS in

Morley v. Lake Shore Ry. Co. (146 *id.*, 170).

See also

Brine v. Insurance Co. (96 U. S., 637).

We think the language in the *Watson* case (from which Judge FOLGER dissented and in which Judge PECKHAM took no part) is too broad, in that it seems to place the matter of the lien of judgments *wholly* under the control of the legislature (see 47 N. Y., p. 165); but even if it be otherwise sound, it is clearly distinguishable in two important features: (1) In the case at bar when the statutory remedy is cut off, *all* remedy is taken from us, whereas in the *Watson* case it might be argued that the fund paid by the railroad company to the owner could still be pursued in a court of equity or otherwise, and so in no real degree was the judgment creditor deprived of his remedy by the cutting off of his lien upon the real estate of the judgment debtor; and

(2) What the learned judge below calls our "remedy," that is our vested right to subject the six rod strip to the purposes of our incorporation, was really the very essence of the thing granted us by the State; and the State cannot now take that away from us simply because it gave it to us, any more than it can withdraw at will from any other contract it may have entered into.

The reasoning of the *Watson* case, in its apparent breadth of application, was passed with evident questioning in

Crane v. City of Elizabeth (36 N. J. E., 342).

In the dissenting opinion of DWIGHT, C., in
Fitzpatrick v. Boylan (57 N. Y., 442)

the case seems to be regarded as supporting the proposition for which we contend, namely, that a remedy is a part of the obligation of the contract in those cases where, without the remedies that are taken away, no efficient remedy remains. The *Fitzpatrick* case turned on the effect of a new mechanics lien law, and DWIGHT, C., recognized the principle we are contending for when he said :

“ It may even be properly claimed that the lien was a part of the contract, as the mechanic may be fairly supposed to have contracted to furnish the materials, etc., with a view to this remedy against the owner.” Citing

Blauvelt v. Woodworth (31 N. Y., 285, 287).

We cannot find that the *Watson* case has been cited on the point now under consideration anywhere else until referred to in the opinion below, except in a case in Michigan where a new mechanics lien law gave substantially the same remedy as the one it was designed to supersede, the difference being merely in the procedure for enforcement.

Hanes v. Wadey (2 L. R. A., 498, 500).

But we agree with Justice HERRICK that if section six of the Railroad Law impresses the land with a *lien*,—be it good for one year or for 985 years,—it deprives the owner without notice and without compensation of the most valuable incident of property, the right of unrestricted disposal; and it is just so far unconstitutional and void. But we do not think that that is its effect.

The operation of section six must be looked at from two sides: from the side of the railroad and from the side of the land owner. Looking at it first from the side of the land owner, we are free to concede that if to any material degree its operation is to place a burden upon the land or to increase a burden already existing thereon, it falls within the inhibition of the constitution. But does it? All lands owned by individuals or by private corporations, and not devoted to a public use, are liable to be taken at

any time by an exercise of the sovereign right of eminent domain; that is, the owner may be deprived of his land for a public use upon just compensation being made to him therefor. If such liability be a burden, all land is subjected to it and it is not usually recognized as a burden. Section six, we submit, does not increase this burden, but simply gives it direction. The land was previously liable to be taken for a public use, upon due payment therefor; it is still liable to be taken for such use upon such payment. Only, *now* it is liable to be taken by the railroad which shall have complied first with the provisions of section six, or else by sovereign New York if she elects to take it before any railroad shall have so complied. This cannot in any way be held to have *increased* the burden upon the land. The owner could never previously have conveyed his property free from a liability to be taken by eminent domain; he cannot now do so. That is all. The fact that he knows the particular corporation or the particular personality which will exercise that right, is not any added restraint upon alienation or any increase of burden. Therefore, the provisions of section six are *not* open to the objection which the words of the Court of Appeals in the Hornellsville case would seem to indicate.

Applying these principles to the case at bar, we find that McGinn, the Finches, Hitchcock and Ashley owned the six rod strip across Township 15, subject to being divested of it at any time for a public use upon payment of compensation. They could not convey it freed from such liability. On the morning of October 7th, when the fifteen day period had expired after the filing of the maps and the serving of notice, they held the land subject to being taken by the Adirondack Railway Company for a public use upon payment of compensation. Their burden had not been increased; yet that is all that they owned in the land, all they did or could convey to the Indian River Company, all that the Indian River Company ever acquired, and all that the State ever got from the Indian River Company either by deed or condemnation,—*unless* there was something in the sovereignty of the State which merged or destroyed or rendered inoperative this liability of the six rod strip to be taken by the Adirondack Railway Company.

So much for the operation of section six from the land owner's standpoint.

From the side of the railroad it is apparent that the statute gave and was intended to give and was properly construed in the three aforementioned opinions, and in hosts of others, as giving, an exclusive, vested right to construct, maintain and operate its railroad over the land so designated.

See

Sioux City R. R. v. Chicago R. R. (27 Fed. Rep., 770).

Davis v. Titusville R. R. (30 Amer. & Eng. R. R. Cases, 341).

Denver R. R. v. Alling (99 U. S., 468).

Denver R. R. v. Carson City R. R. (99 *id.*, 463).

Morris & Essex R. R. v. Blair (9 N. J. Eq., 635).

Unless, then, there were something peculiar in the character of the State as a grantee, which of itself would lawfully destroy without notice and without compensation this vested right,—which is manifestly of great value to the plaintiff in error,—the State took just what the Indian River Company had, and no more, and was therefore never entitled to a judgment in this action enjoining the exercise by us of such right. That there is no such power in the State, and that her assumption thereof not only impairs the obligation of a contract which she herself made, but also violates the constitutional inhibition against the taking of private property without due process of law, is discussed in other parts of this brief.

It only remains to point out under this head that no question is here involved of the binding effect upon this Court of the decisions of the State Courts of New York.

In

Gourmley v. Clark (134 U. S., 338),

Mr. Chief Justice FULLER said:

“Upon the construction of the constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the federal Constitution

or of a federal statute, or of a rule of general or commercial law."

See also

Stutsman County v. Wallace (142 U. S., 293).
Bucher v. Cheshire R. R. (125 *id.*, 555).
Burgess v. Seligman (107 *id.*, 33, 34).

In the last mentioned case, a leading one on this subject, Justice BRADLEY said:

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred * * * no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. * * * * Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which became rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. * * * But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment."

In

Norton v. Shelby County (118 U. S., 440),

Justice FIELD said:

"On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according as they contain true or erroneous expositions of the law as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive; such as relate to the existence of her subordinate tribunals; the eligibility and election or appointment of her officers; and the passage of her laws. No Federal court should refuse to accept such decisions as expressing on these subjects the law of the State."

See also

Butz v. City of Muscatine (8 Wall., 582).
Wade v. Travis County (174 U. S., 499, 509).

In

Pease v. Peck (18 How., 599),

GRIER, J., said:

“ In all cases where there is a settled construction of the laws of a State, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or farther inquiry. * * * When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions,—and much more is this the case where after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedents.”

In

Louisville R. R. v. Palms (109 U. S., 257),

the Court, by MATTHEWS, J., said:

“ The question we have to consider and decide is whether *in the judgment under review* the Supreme Court of Florida gave effect to a law of the State which in violation of the Constitution of the United States impairs the obligation of a contract. In reaching a conclusion on this point, we decide for ourselves, independently of the decision of the State court whether there is a contract and whether its obligation is impaired; and if the decision of the question as to the existence of the alleged contract requires a construction of State Constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, *except where they have been so firmly established as to constitute a rule of property.* Such has been the uniform and well-settled doctrine of this court.” Citing

State Bank of Ohio v. Knoop (16 How., 369, 391),

and citing and quoting from Chief Justice TANEY’s opinion in
Ohio Life Ins. Co. v. Debolt (16 How., 416-432).

Nor will this Court accept as conclusive a decision of the State Court after the rights of the parties have become fixed.

East Alabama Ry. v. Doe (114 U. S., 353).
Buncombe County Comm'srs v. Tommey (115 *id.*, 127).
Anderson v. Santa Anna (116 *id.*, 362).

The rule that decisions of the highest Court of the State, as to the interpretation or construction of the constitution and laws of the State, are controlling on this Court, is in any event limited to decisions announced before the rights of parties accrued.

Bolles v. Brimfield (120 U. S., 763).
German Bank v. Franklin B. (128 *id.*, 538).

In the latter case the Court referred to the case of

Douglass v. County of Pike (101 U. S., 677),

where it was said:

“ After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself.”

See to same effect

Folsom v. Ninety-six (159 U. S., 626-627).

A single decision of the highest Court of the State, even when construing words in a deed or will and so affecting title to real estate is not conclusive upon this Court; but only when those words have by a series of decisions become a settled rule of property.

Barber v. Pittsburgh Ry. (166 U. S., 100).

V.

The State cannot deprive the plaintiff in error of its vested property rights under any pretended exercise of the reserved power; nor in any other way except by a direct taking upon a lawful exercise of one of its sovereign powers.

That the acts of 1863, 1865, etc., and all the general legislation affecting the rights of plaintiff in error, were passed subject to the constitutional provision of 1846:

“Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. *All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.*” (Article VIII, Section 1. See Appendix to Brief, p. 2);

and that 1 Rev. Stats., Chap. XVIII, Title 3, §8 (See Appendix to Brief, p. 3), in force from 1829 to 1882, reads as follows:

“The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal in the discretion of the legislature”;

and that §48 of the general railroad law of 1850, in force from 1850 to 1890, contained this provision:

“The legislature may at any time annul or dissolve any incorporation formed under this act; but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.” (*Laws 1850, Chap. 140, §48.* See Appendix to Brief, p. 7),

is, of course, conceded. But we submit that the provisions of the federal constitution, as uniformly interpreted in a long line of authorities in this and in other courts, including the courts

of New York, do not permit the State under such "reserved powers," to impair the obligation of a contract or to deprive a person of his property without due process of law.

Within the meaning of these federal safeguards a corporation has been held to be a "person."

Minneapolis R. R. v. Beckwith (129 U. S., 26).
Smyth v. Ames (169 *id.*, 466, 522, 526).

The reserved power to alter, amend or repeal, whether reserved in the constitution or by a statute, is not, and cannot upon the most primary considerations of justice and common honesty, be held to be a *condition* of the grant by the State of any franchises or rights of a contractual nature. This has been repeatedly held not only in this court, as we shall show below, but also in New York by a long line of established cases. See the well considered opinion of Chief Judge RUGER in the famous Broadway Railroad case.

People v. O'Brien (111 N. Y., 1, 49),

and the numerous cases cited therein, as well as those following and approving such decision.

These provisions to alter, amend or modify do not give to the legislature an arbitrary control over the rights and property of a body of corporators, but are limited by the recognized principle of justice and right that *the proposed alteration must be reasonable and consistent with the scope and object of the corporation as originally agreed upon.*

Morawitz on Corporations, §1096.

Nor are the words contained in the provision of the Revised Statutes above quoted, that the charters of all corporations thereafter granted should be subject to alteration, suspension or repeal "at the *discretion* of the legislature," any more comprehensive than a simple power to alter, amend or repeal. This has been expressly held in the case of

Hamilton Gas Co v. Hamilton City (146 U. S., 258, 271).

In the case of

People v. O'Brien (111 N. Y., 1, 51),

already cited, Judge RUGER said:

"An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law; and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void."

In *Shields v. Ohio* (95 U. S., 324) SWAYNE, J., said:

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases."

A case in which this subject is well considered is

Comm'srs of Fisheries v. Holyoke Co. (104 Mass., 451).

It appeared in this case that defendant company had purchased its plant from the Hadley Falls Co., and that that company had been incorporated with power to build a dam across the Connecticut River at Holyoke upon payment of damages to the owners of the fishing rights *above* such dam. It did so. *The act permitting such construction was subject to a general act permitting alteration, amendment or repeal at the pleasure of the legislature.* After the Holyoke Co. had succeeded to the rights, etc., of the Hadley Falls Co., the fisheries *below* the dam began to suffer because the shad not being able to pass the dam to their usual spawning ground, did not come up the river at all. The plaintiffs, acting for the State and under a general statute giving them power so to act, brought suit to compel the defendant to put a suitable fishway in their dam. Defendant

resisted on the ground that the State's compelling them so to do impaired the obligation of the contract included in the original grant to the Hadley Falls Co. *Held, GRAY, J.*, that as it did not appear that the original grant permitted them to construct a dam *without* a fishway, and as the construction of fishways was a public use, the reserved power to amend or alter permitted the State to compel the construction of the fishway. He spoke on the general subject as follows:

"The extent of the power reserved by such an enactment has been the subject of some diversity of judicial opinion, and a definition of its extreme limit is not necessary to this case. It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it, *that will not defeat or substantially impair the object of the grant, or any rights which have vested under it*, and that the legislature may deem necessary to secure either that object or other public or private rights."

The *Holyoke Co.* case was brought to this Court on writ of error, as

Holyoke Co. v. Lyman (15 Wall., 500, 522).

Justice CLIFFORD wrote the opinion, concurred in by a unanimous Court, and made the words of Judge GRAY above quoted and italicized, the words of this Court.

Another well-known Massachusetts case on the same subject, is

Commonwealth v. Essex Company (13 Gray, 239),

where it appeared that the act of incorporation of defendant permitted it to dam the Merrimac River upon its constructing a fishway to be approved by the county commissioners. The company constructed a fishway under the direction of the commissioners, who duly approved the same. Later, the company was authorized to increase its capital stock to a given sum upon condition that it would pay damages to the owners of the fishing rights above the dam, which were occasioned by the alleged

insufficiency of the fishway already constructed. The company accordingly paid about \$26,000 damages and increased its capital stock. Eight years later a statute was passed, compelling the Essex Company to make and maintain around its dam a suitable and sufficient fishway for the usual and unobstructed passage of fish. Upon defendant neglecting to construct a new fishway, this indictment was found. *The original charter had been granted subject to amendment, alteration or repeal.* SHAW, C. J., commented (p. 246) upon the great importance to the Commonwealth, as a public use, of protecting the inland fisheries, but held that there was no power in the legislature to compel the company to do the acts from which by the terms of their charter *as a contract* they had been exempted; and he pronounced the latter act null and void.

In

St. Louis, Iron M't'n, &c., Ry. v. Paul (173 U. S., 408),

an act of Arkansas providing that upon the discharge of a railway employee his wages should become payable on the day of his discharge and should continue thereafter until paid, not exceeding 60 days, was held valid under the reserved power, as being wholly prospective in operation.

FULLER, C. J., said: "The power to amend 'cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' WAITE, C. J., in *Sinking Fund Cases* (99 U. S., 700); but any alteration or amendment may be made 'that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights.' GRAY, J., in *Commissioners v. Holyoke Company* (104 Mass., 446, 451); *Greenwood v. Freight Co.* (105 U. S., 13); *Spring Valley Co. v. Schottler* (110 U. S., 347)."

See also *Close v. Greenwood* (107 U. S., 466, 476).

In

Georgia R. R. v. Smith (128 U. S., 174, 182),
Justice FIELD said:

"It is conceded that a railroad corporation is a private

corporation though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contract."

To same effect, see

Pearsall v. Great Northern Ry. (161 U. S., 646).
Bank of Commerce v. Tennessee (163 *id.*, 416, 424).

The case of

Houston, etc., Ry. v. Texas (170 U. S., 243),

seems in point. It there appeared that plaintiff in error was the successor of the Galveston & Red River Railway, which had been incorporated in 1848 with the right to make, own and maintain such branches as they deemed fit. It changed its name by act of legislature in 1856 to Houston & Texas Central Railway.

The Washington County Railroad was incorporated in 1856 with the right to construct, maintain and operate a line from some point on the line of the Houston Railway, to the town of Brenham. It at once constructed and put in operation a line from the village of Hempstead (on the line of the plaintiff in error), straight towards the City of Austin, to the town of Brenham, a distance of 25 miles.

In 1853 an act had been passed granting the plaintiff in error (under its then name of Galveston & Red River Railway) the right to construct a branch *towards* the city of Austin; and Mr. Chief Justice FULLER (p. 254) held this to be an authority to construct a branch *to* the city of Austin, which had not been repealed at the times hereinafter referred to.

In 1866, a special act of the legislature gave to plaintiff in error a grant of 16 sections of state land for every mile of road it had constructed or might construct in accordance with its charter.

In 1868, the Washington County Railroad was sold in foreclosure and purchased by plaintiff in error. On the day of the purchase (August 29th) the convention assembled to frame a new constitution for the State and which did frame the constitution adopted in 1869, passed an ordinance reciting that plaintiff in error had become the owner by purchase of the Washing-

ton County Railroad; that plaintiff in error desired to extend its Washington County branch to Austin as soon as it could be done; that the Washington County branch was and in said ordinance was declared to be a part of the plaintiff in error; and that plaintiff in error should have the right to extend such branch to Austin by the most eligible route.

The new constitution, adopted in 1869, prohibited land grants to railroads.

In 1870 an act was passed declaring the Washington County Railroad to be a part of the plaintiff in error, and that plaintiff in error should have the right to build from Brenham to Austin, and other branch lines. It completed building to Austin and completed the specified part of its main line all within the times limited by the Act of 1870 as a condition of the continuance of the right to land grants seceured to it by previous legislation.

The question presented to this Court was the company's right to land, earned upon its construction from Brenham to Austin.

Chief Justice FULLER said: "The State courts have applied to the road from Brenham to Austin the same rule laid down as to new lines authorized to be constructed for the first time after the constitution of 1869 was adopted. We cannot concur in this view, but, on the contrary, are of the opinion that the constitutional provision as thus enforced impairs the obligation of the contract between the State and the company and cannot be sustained."

He then shows (p. 257) that at the time the constitutional provision was adopted the company had acquired the Washington County Railroad, with the right to extend from Brenham to Austin by the most eligible route; that it had completed and had in operation five sections of its main line and through its acquisition of the Washington County Railroad, so much of its branch towards Austin as extended from Hempstead to Brenham.

"Thus it is seen," he says at p. 257, "that the company had been granted 16 sections of land per mile for the construction of the Austin branch as well as of the main line; *that it had accepted the grant, and had commenced to earn it, and had acquired the right to earn it*

by the construction of an important part of the line which the State, by the grant, intended to promote before the adoption or acceptance of the constitution of 1869. The company had not merely organized and commenced the work it was incorporated to carry on, but had completed a large part of it."

The State court held that the line from Brenham to Austin was an independent enterprise authorized for the first time by the act of August 15th, 1870; and being a new and additional line, no land grant could be claimed for it because the constitutional provision was then in force. *Held, error.*

The ordinances of the constitutional convention of 1868 were of themselves incapable of accomplishing anything (following State court decisions); yet their ratification by the Act of 1870 removed all objection to their validity.

VI.

The provisions of the State Constitution of 1895 which declares that all lands within the limits of the Forest Preserve then owned or thereafter acquired by the State should be forever kept as wild forest lands and should not be leased, sold or exchanged or be taken by any corporation, public or private, and that the timber thereon should not be removed or destroyed, cannot defeat or impair the obligation of the State to this plaintiff in error.

The constitutional provisions referred to will be found in section seven of article seven of the State Constitution which went into effect on January 1st, 1895 (Appendix to Brief, p. 2). They were taken substantially without change from a theretofore existing statute, forming a part of the general forest legislation of the State which commenced in 1885 (See Appendix to Brief, pp. 37-49).

If what we have urged in the preceding parts of this brief be sound, namely, that the State was powerless by any legislation to defeat our vested right to construct, maintain and operate our road in accordance with the grants of 1863, 1865, etc., then the proposition at the head of this point is equally sound. For it is not the question as to whether the State of New York is speaking through its legislature or through its organic law, that determines the breach of faith,—that impairs the obligation of the contract,—but whether the effect of its speaking or acting in either form destroys, without notice and without compensation, a vested right of property theretofore granted by it.

But the proposition is too well settled to call for further argument. See

Houston, etc., Railway v. Texas (170 U. S., 243).

Edwards v. Kearzey (96 id., 604).

Gunn v. Barry (15 Wall., 610).

VII.

The condemnation features of the Act of 1897 are unconstitutional and void.

Even if it were true that the State by condemning against the Indian River Company could defeat our right of way across the six-rod strip, still they have not yet done so; for the act under which they proceeded violates the safeguards secured by the Fourteenth Amendment and conferred upon the forest preserve board no authority whatsoever to act.

The material provisions of this act of 1897 have already been pointed out, and we have already stated our view as to wherein it fails to secure "due process of law,"—that it denies to the person whose property is seized all opportunity to test the true nature of the alleged public use or the lawfulness of the taking.

Here, too, it may be profitable to point out what we never questioned below,—although a reading of the opinion of the

learned Judge in the Court of Appeals might suggest the contrary,—that in an exercise of the sovereign power of eminent domain, be it by the State or by a corporation to which an exercise of that right is delegated, *the necessity and expediency of the taking are always within the discretion of the legislature and may not be reviewed by the courts.* But that does not mean that the courts are therefore deprived of all right to pass upon the *nature* of the use for which the property is taken. It is conceded that the legislature is wholly without power to take private property for a *private* use; and if the courts are by any act of the legislature denied all opportunity to review and to pass upon the question as to whether the alleged use is or is not a *public* one, a judicial function of government is usurped. The seriousness of such a result need not be commented upon here.

Government, it has been said, is simply the means of expressing the sovereign will; and we assent to such definition. But in the very nature of things it must refer to government *as a whole* and not to any single branch thereof to the exclusion of the other branches; and if the right be secured, as we insist it is, to every citizen of the United States that before he shall be forever deprived of his property for a use which the legislature may have *termed* a public use, he shall have an opportunity to present for the decision of a court of justice the question as to whether the use really is or is not a public one, then an act of the legislature which either directly or indirectly denies to a citizen such opportunity cannot be held to be valid.

In one more particular let us point out what our position is and has been throughout this case. We have never contended that the *time* when a citizen might review the legality of the taking of his property, bears in any way whatever upon the question of due process. So long as such right is in some form or other secured to him, it is immaterial whether he can exercise it before, at the time of or after the taking.

Nor is the kind of *notice* material,—whether personal or under certain conditions constructive. So long as an opportunity to test the lawfulness of the taking is given by or through the notice, the requirements of "due process" as demanded by the federal constitution are complied with.

These propositions seem elementary. And yet they were denied by the learned judge in the Court of Appeals who held, and unequivocally stated, that when sovereign New York exercises the right of eminent domain, the citizen is entitled to *no* notice and to *no* hearing,—except of course as to the question of damages, which we are not now discussing.

The “notice” which by section four of the act is to be served upon the owner is not the kind of notice he is entitled to, for it grants him no opportunity whatsoever to protect his rights against an unlawful exercise by the forest preserve board of the power which the act is supposed to confer. The Statute says (§4):

“ * * * The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing such description and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and *be* the property of the State.” (See Appendix to Brief, p. 50.)

It needs no argument to point out that this sort of notice secures no right to the owner, and really amounts to nothing more than the courtesy of a warning to him that he must not continue to exercise acts of ownership over what up to that moment he had rightly believed was his, on the pain of being held liable in trespass.

Perhaps, if the taking were by a municipal corporation or by some body politic which could be subsequently sued by the owner, the notice provided by this act *might* be held to give him the right to go into court and in a suit for trespass or in such other form of action as he might be advised, have his day in court as to the right or legality of the taking of his property. But the State is sovereign and cannot be sued except by its own gracious permission.

People v. Dennison (84 N. Y., 272, 283).
Locke v. The State (140 *id.*, 480).

Meigs v. Roberts (24 Misc., 668).

Reeside v. Walker (11 How., 290), and cases cited;

and *neither in the terms of this act nor elsewhere does the State permit an owner to test the legality of its action.* It seizes his property for an alleged public use without the slightest intimation of its intention so to do, and then arbitrarily says: You may go into the Court of Claims and prove the amount of the damages which our taking of your property has caused you, but you shall have no hearing whatever upon the question as to whether the use to which we intend to apply your land is or is not a public use, and no opportunity to test the legality of our action. We, the legislature, have assumed that the use is a public use, and you must abide by such assumption, whether we be right or wrong; we intentionally deny you all opportunity to be heard on that question or to test in anywise the legality of our action.

If the act contained an express provision that no owner whose land was taken under its terms, should ever be permitted to maintain as plaintiff any suit in any court to test the legality of the taking, no court would hesitate for a moment in declaring the act unconstitutional; and yet indirectly and by omission, instead of by express provision the act of 1897 declares that very thing.

The words of Justice JACKSON sitting at Circuit, in

Scott v. City of Toledo (36 Fed. Rep., 397),

seems to state the true rule.

“The legislature,” he says, “may prescribe the kind of notice and the mode in which it shall be given; *but it cannot dispense with all notice.* The owner must in some form, in some tribunal or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened * * * in order to constitute such procedure due process of law.”

Now, how does the learned judge below justify a taking by the State of private property for an *alleged* public use without

notice and without opportunity to test the legality of the taking? He puts it on three grounds:

(1.) That there is no necessity for any safeguard against the *taking*, because the right to take is all there is of the power of eminent domain and is necessarily conceded to exist when the existence of the power is admitted,—safeguards being necessary only when the question of compensation is reached (Record, p. 100).

(2.) That a public park has been frequently adjudged to be a public use and therefore (inferentially) there is nothing for the court to pass upon under this statute as to the nature of the use (Record, pp. 105-106); and

(3.) That all that "due process" requires is a method of procedure based upon long established usage in similar cases. And he points to the early acts in New York authorizing a taking of lands by the State for the purposes of the Erie Canal, as establishing what shall be due process when the State itself acts (Record, pp. 100-101).

1. NO NEED OF SAFEGUARDS.

We have not that degree of confidence in the infallibility and integrity of public officials to warrant an unquestioning acquiescence in whatever they might elect to do under the provisions of the Act of 1897. It is not impossible to conceive that land be appropriated under the provisions of this act which as a matter of fact lay just outside the limits of the Adirondack Park as defined by law, but which through some error or conflict in surveys was believed in good faith by the Forest Preserve Board to lie wholly within such limits. The Board supposed it was acting within the scope of its authority when it seized the land, and yet as a matter of fact had no more right to take that property than it would to seize land in Great Britain. Yet the owner is deprived of his property, and *the legality of the taking can never be questioned*.

Is that the "due process of law" guaranteed by the federal constitution? Can a citizen be thus deprived of his property under a legislative claim of right and at the same time be denied by that legislature all opportunity, as well after as before

such taking, of proving or disproving in judicial proceedings the existence of a *fact* upon which the legality of the taking depends?

2. A PUBLIC PARK IS ALWAYS A PUBLIC USE.

To maintain the position here asserted by the learned Judge is to give judicial sanction to the proposition that in some instances the legislature *may* usurp the judicial functions of government, and in those cases deny to a citizen whose property it would take, that "due process of law" which otherwise and in cases where the character of the proposed use might be more involved, the citizen would concededly be entitled to. The constitutionality of an act cannot be determined by any such considerations. The test is always not what has been done, but what may or may not be done under an act of the legislature.

The cases cited by the learned Judge in support of his proposition that a public park is a public use, are authorities simply as establishing that the use in each of *those* cases, was a public use. How can an adjudication in the *Shoemaker* case, for instance (*Shoemaker v. U. S.*, 147 U. S., 282, 297), that lands taken for the Rock Creek Park in the District of Columbia were taken for a public use, be *conclusive* upon every citizen of the State of New York that anything the forest preserve board may seek to condemn under the asserted authority of the Act of 1897, is taken for a public use? And yet, although it seems absurd to say so, that is precisely the effect which the learned Judge below would give to the cases he cited.

The proposition for which we contend may be stated thus: The legislature has no power to say 'What we choose to call a park is a public use, and no one shall be permitted to question it'; and yet that is exactly what this act of 1897 does, as construed by the Court of Appeals. The legislature has ample right to take private property for a park; but whether what it terms a park is really a park and therefore a public use, or is taken for some private use under the guise of a taking for a park, an owner should always have the right to inquire.

We need not dispute for the purposes of this case the law of *Waterloo Company v. Shanahan* (128 N. Y., 357-360), which holds that while the court always has the power to deter-

mine whether or not a proposed use is public, and that a declaration by the legislature on such point is *not* conclusive, still the scrutiny of the courts must be confined to matters appearing on the face of the bill itself and to things that are the subject of judicial notice, and that it cannot institute an inquiry concerning the motives and purposes of the legislators in enacting the measure in order to show that under the guise of a pretended public use they were corruptly or otherwise seeking to take private property for a private use.

But we do insist, conceding all this, that an act which precludes a citizen from submitting even its terms to a judicial scrutiny, is a usurpation by the legislature of a judicial function and deprives a citizen of his property without due process of law.

3. AN ESTABLISHED USAGE DEFINES " DUE PROCESS."

We think the learned Judge entirely misapprehended the extent to which custom or usage may be made the standards of "due process of law," and furthermore failed to scan closely the evidence of the so-called usage upon which he relied,—the matter of the Erie Canal.

In *Murray's Lessees v. Hoboken Land Co.* (18 How., 272, 277), Mr. Justice CURTIS considered the meaning of "due process" from its origin as " law of the land " in Magna Carta, and said :

" To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This certainly seems a more thoughtful consideration of the true meaning and effect of this much adjudged and still unde-

fined phrase, "due process of law," than that accorded it by the learned Judge below. Certainly if we apply to the Act of 1897 the tests prescribed by Mr. Justice CURTIS, we find at the very outset that it *does* conflict with other provisions of the constitution,—as we have already shown,—and that fact in itself condemns the act as falling short of the due process guaranteed.

And then as to usage: Can it be said that that which was done under the Canal Act of 1817, (assuming such act ever to have been adjudged constitutional on this point), was the usage or custom whereby sovereign New York should exercise its right of eminent domain, that the people had in mind as constituting "due process of law," when they embodied that phrase in their constitution of 1846? Is it not more rational to believe that the provision was borrowed from the Fifth Amendment to the Constitution of the United States, and carried with it whatever meaning the words possessed when such Fifth Amendment was adopted?

But even if we are wrong in this, we still submit, with the utmost deference to the learned judge below, that the decisions do not support his assertion as to frequent or indeed *any* adjudication on the constitutionality of the canal acts, if he thereby means, as his opinion would indicate, the constitutionality of the procedure whereby the State may lawfully take without any opportunity whatsoever to the owner, to test the legality of the taking. He says (Record, p. 101):

"All the canals of the State were built under these acts, and much property of great value was appropriated solely under their provisions. For many years the powers thus conferred were in constant exercise, and although these statutes were often before the courts, not one was ever declared unconstitutional because of the summary method authorized in appropriating property. There was neither hearing nor notice, for the canal commissioners, or their agents, simply took possession of and used 'all lands, streams and waters' which they deemed necessary for the use of the canals. This completed the condemnation, except that the damages when ascertained were paid by the State. Under some of the acts, if the property owners filed their claims within one year after the appropriation, they received the amount

awarded by the appraisers; and unless they filed their claims within the period mentioned, they received nothing in the absence of special legislation. Adjudications made many years ago, and acquiesced in ever since, *sustained, some directly and others indirectly, the constitutionality of this legislation*, and without further discussion we hold that the statute under consideration is not unconstitutional because it does not provide for condemnation by due process of law. (*Wheelock v. Young*, 4 Wend, 647; *Jerome v. Ross*, 7 Johns. Ch., 315; *Rogers v. Bradshaw*, 20 Johns., 735.)"

We have found that these canal acts were often before the courts, as stated by the learned judge, and we have carefully studied over *two hundred* reported cases,—all we could find,—in which they were in some form or other up for adjudication. *In not a single instance was the question ever decided or, so far as we could perceive, even presented as to whether the acts were valid or invalid because they failed to provide for any opportunity for a hearing as to the legality of the taking.* On the features awarding compensation, as to whether specified parts of the soil could be seized, as to whether mere contractors could exercise the right of entry and appropriation under the protection of the statute, and kindred questions, were frequently before the courts; and the acts were invariably sustained. But that is very different from the position for which the learned judge has written, namely, that the legality of those features of the canal acts which resemble the condemnation features of the act of 1897, have been sustained by numberless adjudications, and that *therefore* when the State seeks to exercise the right of eminent domain, due process does not require that the owner shall be heard as to the legality of the taking.

But suppose after all that he were right, and that an unbroken line of decisions of the highest Court of the State of New York had uniformly held as the learned judge has held in the opinion now under review. What of it? Under the cases already noted, those decisions are not binding upon this Court which has invariably held that due process of law requires a hearing before it shall finally condemn.

See

McMillen v. Anderson (95 U. S., 37).
Davidson v. New Orleans (96 *id.*, 97).
Huling v. Kaw Valley R. R. (130 *id.*, 559).
Boom Co. v. Patterson (98 *id.*, 406).
U. S. v. Jones (109 *id.*, 513).
Kentucky Railroad Tax Cases (115 *id.*, 332).
State Railroad Tax Cases (92 *id.*, 575).
Spencer v. Merchant (125 *id.*, 356).
Castillo v. McConnico (168 *id.*, 674, 680).
Williams v. Supervisors (122 *id.*, 154, 164).
Pittsburgh Ry. v. Backus (154 *id.*, 421).
Holden v. Hardy (169 *id.*, 389).
Lawton v. Steele (152 *id.*, 137).
Bellingham Co. v. New Whatcom (172 *id.*, 318).
Hagar v. Reclamation Dist. No. 108 (111 *id.*, 701).
Hurtado v. California (110 *id.*, 516, 536).
Windsor v. McVeigh (93 *id.*, 274, 279).

And that the law is really the same in New York, see

Rensselaer R. R. v. Davis (43 N. Y., 146).
People v. Supervisors (70 *id.*, 234).
People v. Turner (117 *id.*, 236),

and the very able opinion of Judge EARL in the widely followed case of

Stuart v. Palmer (74 N. Y., 183).

VIII.

The judgment should be reversed and the cause should be remanded with instructions to the Court of Appeals to direct the entry of final judgment in this action in favor of the plaintiff in error, upon the stipulation for judgment absolute given by the defendants in error.

Respectfully submitted,

R. BURNHAM MOFFAT,
Counsel for Plaintiff in Error.

January, 1900.

No. 439.

JAN 10 19
JAMES H. MCKEEAN

Opp. to ~~Ex. of~~ ~~Moffat for P.~~
Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Jan. 10, 1900.
No. 439.

THE ADIRONDACK RAILWAY COMPANY,

Plaintiff in Error.

against

THE PEOPLE OF THE STATE OF NEW YORK,

Defendants in Error.

APPENDIX TO BRIEF

FOR PLAINTIFF IN ERROR, CONTAINING THE CONSTITUTIONAL
AND STATUTORY PROVISIONS OF THE LAW OF NEW
YORK APPLICABLE TO THE QUESTIONS
INVOLVED HEREIN.

R. BURNHAM MOFFAT,

Counsel for Plaintiff in Error.

Constitutional Provisions.

ARTICLE I.

§1. No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. (*Based on provisions of §13 of Constitution of 1777; taken from Constitution of 1846.*)

§6. No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. (*Taken from Constitution of 1846.*)

§7. When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited. General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes. (*Taken from Constitution of 1846.*)

§10. The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat to the people. (*Taken from Constitution of 1846.*)

§12. All lands within this state are declared to be allodial, so that, subject only to the liability to escheat, the entire and

Constitutional Provisions.

absolute property is vested in the owners, according to the nature of their respective estates. (*Taken from Constitution of 1846.*)

ARTICLE VI.

§9. After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. * * * Except where the judgment is of death, appeals may be taken as of right to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court finally determining actions or special proceedings, *and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them.* * * (New in 1895.)

ARTICLE VII.

§7. The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. (New in 1895.)

ARTICLE VIII.

§1. Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the legislature the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed. (*Taken from Constitution of 1846.*)

General Corporation Legislation.

1 REVISED STATUTES, CHAP. XVIII, TITLE 3, entitled "Of the General Powers, Privileges and Liabilities of Corporations,"

In force from 1852 to 1882 (Rev. Stats., 4th & 5th Editions).

§1. Every corporation, as such, has power:

1. To have succession by its corporate name for the period limited in its charter; and when no period is limited, perpetually.
2. To sue and be sued, complain and defend in any court of law or equity.
4. To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter.

§2. The powers enumerated in the preceding section, shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated.

§8. The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

Former General Railroad Legislation.

LAWS 1850, CHAP. 140.

AN ACT to authorize the formation of railroad corporations, and to regulate the same.

Passed April 2, 1850, "three-fifths being present."

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§1. Any number of persons, not less than twenty-five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed, for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company; the number of years the same is to continue; the places from and to which the road is to be constructed, or maintained and operated; the length of such road as near as may be, and the name of each county in this state through or into which it is made, or intended to be made; the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of road constructed, or proposed to be constructed, and the number of shares of which said capital stock shall consist and the names and places of residence of thirteen directors of the company, who shall manage its affairs for the first year, and until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the next section, such articles of association may be filed in the office of the secretary of state, who shall endorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations, and be subject to the provisions contained in title three of chapter eighteen of the first part of the Revised

Former General Railroad Legislation.

Statutes, except the provisions contained in the seventh section of said title.

§13. In case any company formed under this act is unable to agree for the purchase of any real estate required for the purposes of its incorporation, it shall have the right to acquire title to the same, in the manner and by the special proceedings prescribed in this act.

§22. Every company formed under this act, before constructing any part of their road into or through any county named in their articles of association, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company, or a majority of the directors, and filed in the office of the clerk of the county in which the road is to be made. The company shall give written notice to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by or given to the company, of the route so designated. Any party feeling aggrieved by the proposed location, may, within fifteen days after receiving written notice as aforesaid, apply to a justice of the supreme court, out of court, by petition, duly verified, setting forth his objections to the route designated; and the said justice may, if he considers sufficient cause therefor to exist, appoint three disinterested persons, one of whom must be a practical engineer, commissioners to examine the proposed route, and, after hearing the parties, to affirm or alter the same, as may be consistent with the just rights of all parties and the public; but no alteration of the route shall be made, except by the concurrence of the commissioner who is a practical civil engineer. The determination of the commissioners shall, within thirty days after their appointment, be made and certified by them, and the certificate filed in the office of the county clerk. Said Commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment; and if the proposed route of the road is altered or changed by the commissioners, the company shall refund to the applicant the amount so paid.

Former General Railroad Legislation.

§28. Every corporation formed under this act shall, in addition to the powers conferred on corporations in the third title of the eighteenth chapter of the first part of the Revised Statutes, have power,

1. To cause such examination and surveys for its proposed railroad to be made, as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.
2. To take and hold such voluntary grants of real estate and other property as shall be made to it, to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.
3. To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, and the stations and other accommodations necessary to accomplish the objects of its incorporation; but nothing herein contained shall be held as repealing, or in any way affecting the act entitled "An act authorizing the construction of railroads upon Indian lands," passed May 12, 1836.
4. To lay out its road not exceeding six rods in width, and to construct the same; and for the purposes of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this act for lands taken for the use of the company.
10. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or

Former General Railroad Legislation.

owing thereon, into stock of said company, at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt.

§48. The legislature may at any time annul or dissolve any incorporation formed under this act; but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

Laws 1867, CHAP. 775.

AN ACT to amend an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty.

Passed April 25, 1867.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. If any corporation formed under an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty, shall not, within five years after its articles of association are filed and recorded in the office of the Secretary of State, begin the construction of its road, and expend thereon ten per cent. on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association, as aforesaid, its corporate existence and powers shall cease.

Laws 1874, CHAP. 240.

AN ACT to further amend an act, passed April twentieth, eighteen hundred and sixty-six, entitled "An act supplementary to the act entitled 'An act to authorize the formation of railroad corporations, and to regulate the same,'" passed April second, eighteen hundred and fifty.

Passed April 23, 1874; three-fifths being present.

Former General Railroad Legislation.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section five of chapter six hundred and ninety-seven of the laws of eighteen hundred and sixty-six, entitled "An act supplementary to the act entitled 'An act to authorize the formation of railroad corporations, and to regulate the same,'" passed April second, eighteen hundred and fifty, is hereby amended so as to read as follows:

§5. The continuance of any railroad corporation now existing, or hereafter to be formed under the laws of this State, may be extended beyond the time named for that purpose in its act or acts of incorporation, or in the articles of association of such corporation, by the filing in the office of the Secretary of State a certificate of consent to such extension, signed by the holders of two-thirds in amount of the stock held by the stockholders of such corporation, and in every case where such consent has been or shall be so filed, the term of existence of such corporation is hereby extended and declared to be extended for the period designated in such certificate, and each such corporation shall, during the period named in such certificate, possess and enjoy all the rights, privileges and franchises enjoyed or exercised by such corporation at the time such certificate was or shall be so filed. Each such certificate shall be proved or acknowledged by the individuals signing the same, before some officer authorized by law to take acknowledgments of deeds, and whenever such stock shall be owned or held by firms or copartnerships the execution of such certificate shall be acknowledged by one or more of such copartners; and it shall be the duty of the Secretary of State to record such certificate in the book kept in his office for the record of articles of association of railroad companies. A copy of such certificate and of the acknowledgment thereof, certified by the Secretary of State, shall be presumptive evidence of the truth of the facts therein stated.

§2. This act shall take effect immediately.

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LAWS 1873, CHAP. 469.

AN ACT relative to purchasers of the franchises and property of corporations, whose franchises and property shall have been sold by mortgage.

Passed May 9, 1873.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever the franchises, privileges, easements, rights and liberties of any corporation, created by any act of the legislature of this State, or found and incorporated under or by virtue of any general act thereof, and empowered by said act to mortgage its property or franchises, and the property, estate and effects of any such corporation, have been heretofore, or may be hereafter, sold by virtue of any mortgage executed by such corporation; and whenever the purchaser or purchasers thereof shall have acquired title to the same, in the manner prescribed by law, such purchaser or purchasers may associate with him or them any number of persons; and upon making and filing articles of association, as prescribed by this act, such purchaser or purchasers and his or their associates, and their successors and assigns, being residents of this State, shall thereupon become and be a body politic and corporate, and may take and receive a conveyance of and shall thereupon succeed to, possess and exercise and enjoy all the rights, powers, franchises, privileges, easements, liberties, property, estate and effects of which the title shall have been acquired and conveyed as aforesaid.

§2. In case the said corporation, whose franchises, privileges, easements, rights, powers, liberties, property, estate and effects shall have been so sold as aforesaid, shall have been incorporated under or by virtue of the provisions of any general statute or statutes of this State for the formation of corporations, the certificate so to be made and filed shall be in the form of, and shall state and set forth the particulars which in and by such statute or statutes were required to be stated and set forth in the original certificate of incorporation or articles of association of the said corporation.

Legislation affecting reorganization of railroads.

§3. In case the corporation whose franchises, privileges, easements, rights, powers, liberties, property, estate and effects shall have been so sold as aforesaid shall have been created by any special act of incorporation, then, and in that case, said certificates so to be made and filed shall state and set forth the following particulars, namely:

1. The name of the body politic and corporate so to be formed as aforesaid.

2. The amount of the capital stock thereof, which shall not exceed the amount of the capital stock of the said former or pre-existing corporation authorized by law at the time of such sale as aforesaid, and the number of shares of which the said stock shall consist.

3. The title and time of the passage of the said original act creating the said former corporation, and any other act or acts relating thereto.

4. The number of the directors who shall manage the concerns of the said body politic and corporate, and the names of the first board of directors thereof, and who shall hold their office for one year and until others are chosen in their places.

§4. The said certificate shall be executed in duplicate and acknowledged before some officer competent to take acknowledgment of deeds. One of the said duplicates shall be filed in the office of the Secretary of State, and the other thereof shall be filed in the office of the clerk of the county in which the said corporation first mentioned in this act had its principal place of business. And thereupon the said body politic and corporate so formed as aforesaid shall exist for the time, and may and shall possess, exercise and enjoy, all the powers, privileges, rights, liberties, easements and franchises possessed by the said former corporation, and in the same manner, and to the same extent, and with the same force and effect as the same could have been exercised by the said former corporation, had not such sale as aforesaid been made.

§5. A copy of any articles of association filed in pursuance

Legislation affecting reorganization of railroads.

of this act, and certified by the secretary of State and county clerk, with whom the same shall have been filed, or their deputies, to be a true copy of such articles and of the whole thereof, shall be received in all courts and places as legal evidence of the incorporation of the said body politic or corporate, so to be formed as aforesaid.

§6. This act shall take effect immediately.

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LAWS 1874, CHAP. 430.

AN ACT to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases.

Passed May 11, 1874.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In case the railroad and property connected therewith, and the rights, privileges and franchises of any corporation created under the general railroad law of this State, or existing under any special act of the Legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction made to execute the provisions or enforce the lien of any deed or deeds of trust, or mortgage theretofore executed by such company, the purchasers of such railroad property and franchises, their grantees or assigns, or a majority of them, may become a body politic and corporate with all the franchises, rights, powers, privileges and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by filing in the office of the Secretary of State a certificate, duly executed under their hands and seals, and acknowledged before an officer authorized to take the acknowledgment of deeds, in which certificate the said persons shall describe by name and reference to the act or acts of the Legislature of this State under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the

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court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof, authorizing or directing the same, together with a brief description of the property sold, and shall also set forth the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate.
2. The maximum amount of its capital stock, and the number of shares into which the same is to be divided.
3. The number of directors by whom the affairs of the said new corporation are to be managed, and the names and residences of the persons selected to act as directors for the first year after its organization.

And upon the due execution of such certificate and the filing of the same in the office of the Secretary of State, the persons executing such certificate and who shall have acquired the title to the property and franchises sold as aforesaid, their associates, successors and assigns, shall become and be a body politic and corporate by the name specified in such certificate, and shall become and be vested with, and entitled to exercise and enjoy, all the rights, privileges, and franchises which, at the time of such sale, belonged to or were vested in the corporation formerly owning the property so sold, and shall be subject to all the duties and liabilities imposed by the provisions of the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and of the acts amendatory thereof, except so far as may be inconsistent herewith; and a copy of the said certificate, by the Secretary of State or his deputy, shall be presumptive evidence of the due formation of the new corporation therein mentioned; provided, always, that a majority of said persons shall be citizens and residents of this State.

§2. In case the persons organizing the new corporation to be formed, as provided in the first section of this act, shall have acquired title to the railroad property and franchises which may have been sold as in said section mentioned, pursuant to any plan or agreement for the readjustment of the respective inter-

Legislation affecting reorganization of railroads.

ests therein of the mortgage creditors and stockholders of the company owning such property and franchises at the time of any such sale, and for the representation of such interests of creditors and stockholders in the bonds or stock of the new corporation to be formed, as mentioned in said section, the said new corporation shall be authorized and have the power to issue its bonds and stock in conformity with the provisions of such plan or agreement; and the said new corporation may, at any time within six months after its organization, compromise, settle or assume the payment of any debt, claim or liability of the former company, upon such terms as may be approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization aforesaid; and for the purposes of such plans and of such settlements, the said new corporation may and shall be authorized to establish preferences in respect to the payment of dividends in favor of any portion of its said capital stock, and to divide such stock into classes; provided, nevertheless, that nothing herein contained shall be held to authorize the issue of capital stock by the said new company to an aggregate amount exceeding the maximum amount of such stock mentioned in the certificate of incorporation.

§3. Every stockholder in any company, the franchises and property whereof shall have been sold as aforesaid, shall have the right to assent to the plan of readjustment and reorganization of interest pursuant to which such franchises and property shall have been purchased as aforesaid, at any time within six months after the organization of said new company, and by complying with the terms and conditions of such plan become entitled to his pro rata benefits therein according to its terms.

§4. Full power is hereby given to the railroad commissioners, corporate authorities or proper officials of any city, town or village, who may hold stock in any corporation, the property and franchises whereof shall be liable to be sold, as mentioned in the first section of this act, to assent to any plan or agreement of reorganization which provides for the formation of a new company, in conformity with this act, and the issue of stock

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therein to the proper authorities or officials of said cities, towns or villages, in exchange for the stock of the old or former company by them respectively held at par, subject to the foregoing provisions of this act. And such railroad commissioners, corporate authorities or other proper officials, may assign, transfer or surrender the stock so held by them in the manner required by any such plan and accept in lieu thereof the stock issued by said new corporation in conformity therewith.

§5. This act shall take effect immediately.

LAWS OF 1876. CHAP. 446.

AN ACT to amend chapter four hundred and thirty of the laws of eighteen hundred and seventy-four, entitled "An Act to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases."

Passed June 2, 1876.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The first section of chapter four hundred and thirty of laws of eighteen hundred and seventy-four, entitled "An act to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases," is hereby amended so as to read as follows:

§1. In case the railroad and property connected therewith, and the rights, privileges and franchises of any corporation, except a street railroad company, created under the general railroad law of this State, or existing under any special or general act or acts of the Legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction made or given to execute the provisions or enforce the lien of any deed or deeds of trust, or mortgage theretofore executed by any such company, the purchasers of such railroad property and franchises, and such persons as they may associate

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with themselves, their grantees or assignees or a majority of them, may become a body politic and corporate, and as such may take, hold and possess the title and property included in said sale, and shall have all the franchises, rights, powers, privileges and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by and upon filing in the office of the Secretary of State, a certificate, duly executed under their hands and seals, and acknowledged before an officer authorized to take the acknowledgment of deeds, in which certificate the said persons shall describe by name and reference to the act or acts of the Legislature of this State under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof, authorizing or directing the same, together with a brief description of the property sold, and shall also set forth the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate.
2. The maximum amount of its capital stock and the number of shares into which the same is to be divided, specifying how much of the same shall be common, and how much preferred stock, and the classes thereof, and the rights pertaining to each class.
3. The number of directors by whom the affairs of the said new corporation are to be managed, and the names and residences of the persons selected to act as directors for the first year after its organization.
4. Any plan or agreement which may have been entered into pursuant to the second section hereof.

And upon the due execution of such certificate, and the filing of the same in the office of the Secretary of State, the persons executing such certificate, and who shall have acquired the title to the property and franchises sold as aforesaid, their associates, successors and assigns, shall become and be a body politic and

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corporate, by the name specified in such certificate, and shall become and be vested with, and entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation, which last owned the property so sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and of the acts amendatory thereof, except so far as said provisions, duties and liabilities may be inconsistent herewith, and with the last named rights, privileges or franchises; and a copy of the said certificate, certified by the Secretary of State or his deputy, shall be presumptive evidence of the due formation of the new corporation therein mentioned, provided always that a majority of said persons shall be citizens and residents of this State. In the certificate so to be filed shall be inserted the whole of the plan or agreement in the next section referred to. And such plan, agreement and articles may regulate voting by, and on the part of the holders of the preferred and common stock of said company, and may also allow, provide for and regulate voting at and in said meetings, and also for directors, by and on the part of the holders and owners of any or all of the bonds of the company foreclosed, or of the bonds, issued or to be issued, and payable by the new company, pursuant to any such plan, agreement or articles; such right of voting by bondholders to be in such manner, for such period or periods, and upon such conditions as said articles may authorize and declare; but such articles shall contain suitable provisions for such bondholders voting by proxy. Said articles shall not be inconsistent with the Constitution or laws of this State, and shall be binding upon the company until changed as therein provided for, or until otherwise provided by law.

§2. The second section of the said act is hereby amended so as to read as follows:

§2. In case the persons organizing or whose duty it may be to organize the new corporation to be formed as provided in the first section of this act, shall have acquired title to the rail-

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road property and franchises which may have been sold as in said section mentioned, pursuant to any plan or agreement for or in anticipation of the readjustment of the respective interests therein of the mortgage creditors and stockholders of the company owning, or which last owned, such property and franchises at the time of any such sale, and for the representation of such interests of creditors and stockholders in the bonds or stock of the new corporation to be formed, as provided for in said section, the said new corporation shall be authorized and shall have the power to issue its bonds and stock in conformity with the provisions of such plan or agreement; and the said new corporation may, at any time within six months after its organization, compromise, settle or assume the payment of any debt, claim or liability of the former company, upon such terms as may be lawfully approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization aforesaid; and for the purposes of such plans and of such settlements, the said new corporation may and shall be authorized to establish preferences in respect to the payment of dividends in favor of any portion of its said capital stock, and to divide its said stock into classes; provided, nevertheless, that nothing herein contained shall be held to authorize the issue of capital stock by the said new company to an aggregate amount, exceeding the maximum amount of such stock mentioned in the certificate of incorporation.

1. And it shall be lawful for the Supreme Court to direct a sale of the whole of the property, rights and franchises covered by the mortgage or mortgages, or deeds of trust foreclosed at any one time and place to be named in the judgment or order, either in the case of the non-payment of interest only, or of both the principal and interest due and unpaid and secured by any mortgage or mortgages or deeds aforesaid.

2. Neither the said sale nor the formation of such corporation shall interfere with the authority or possession of any receiver of the property and franchises aforesaid, but he shall remain liable to be removed or discharged at such time as the court may deem proper.

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3. No suit or proceeding shall be commenced against said receiver (unless founded on wilful misconduct or fraud in his trust), except such as shall be commenced before the expiration of sixty days from the time of the discharge of such receiver; but it is further provided, that after the expiration of said sixty days, the corporation that shall own or operate said railroad, shall be liable in any action that may be commenced against such company, and founded on any act or omission of such receiver (for which he may not as aforesaid be sued), and to the same extent as said receiver, but for this act, would be or remain liable, or to the same extent that such corporation would be, had it done or omitted the acts complained of against such receiver.

§3. This act shall take effect immediately.

Laws 1889, Chap. 236.

AN ACT to amend chapter four hundred and thirty of the laws of one thousand eight hundred and seventy-four, entitled "An act to facilitate the reorganization of railroads sold under mortgage and providing for the formation of new companies in such cases."

Became a law without the approval of the Governor, in accordance with the provisions of article four, section nine of the Constitution, May 6, 1889. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter four hundred and thirty of the laws of one thousand eight hundred and seventy-four, entitled "An act to facilitate the reorganization of railroads sold under mortgage and providing for the formation of new companies in such cases," is hereby amended by adding thereto the following section, to be designated and numbered as section five, which shall read as follows:

§5. Nothing herein contained shall be construed to compel a corporation organized under this act to extend its road beyond the portion thereof constructed at the time said corporation ac-

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quired title to such railroad property and franchise, provided the board of railroad commissioners of the State shall certify that in their opinion the public interests under all the circumstances do not require such extension. If said board shall so certify and shall file in their office such certificate (which certificate shall be irreversible by said board) said corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. Nothing herein contained shall be construed to authorize the abandonment of that portion of a railroad which has been constructed and operated.

§2. Nothing herein contained shall apply to Kings county.

§3. This act shall take effect immediately.

General Railroad Law of 1890.

(Became a law June 7, 1890, taking effect May 1, 1891.)

§1. The chapter shall be known as the railroad law.

§4. Subject to the limitations and requirements of this chapter, every railroad corporation, in addition to the powers given by the general and stock corporation laws, shall have power:

1. To cause the necessary examination and survey for its proposed railroad to be made for the selection of the most advantageous route; and for such purpose, by its officers, agents or servants, to enter upon any lands or waters subject to liability to the owner for all damages done.
2. To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; and to acquire by condemnation such real estate and property as may be necessary for such construction and maintenance in the manner provided by law, but the real property acquired by condemnation shall be held and used only for the purposes of the corporation during the continuance of the corporate existence.
3. To lay out its road not exceeding six rods in width, and to construct the same; and, for the purpose of cuttings and embankments, to take such additional lands as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, upon making compensation therefor. * * * *

§6. Every railroad corporation, except a street surface railroad corporation and an elevated railway corporation, before constructing any part of its road in any county named in its certificate of incorporation, or instituting any proceedings for the condemnation of real property therein, shall make a map and profile of the route adopted by it in such county, certified by the president and engineer of the corporation, or a majority of the directors, and file it in the office of the clerk of the county in which the road is to be made. The corporation shall give

General Railroad Law of 1890.

written notice to all actual occupants of the lands over which the route of the road is so designated, and which has not been purchased by or given to it, of the time and place such map and profile were filed, and that such route passes over the lands of such occupants. Any such occupant or the owner of the land aggrieved by the proposed location, may, within fifteen days after receiving such notice, give ten days' written notice to such corporation and to the owners or occupants of lands to be affected by any proposed alteration, of the time and place of an application to a justice of the supreme court in the judicial district where the lands are situated, by petition duly verified, for the appointment of commissioners to examine the route. The petition shall state the objections to the route designated, shall designate the route to which it is proposed to alter the same, and shall be accompanied with a survey, map and profile of the route designated by the corporation, and of the proposed alteration thereof, and copies thereof shall be served upon the corporation and such owners or occupants with the notice of the application. The justice may, upon the hearing of the application appoint three disinterested persons, one of whom must be a practical civil engineer, commissioners to examine the route proposed by the corporation, and the route to which it is proposed to alter the same, and after hearing the parties, to affirm the route originally designated, or adopt the proposed alteration thereof, as may be consistent with the just rights of all parties and the public, including the owners or occupants of lands upon the proposed alteration; but no alteration of the route shall be made except by the concurrence of the commissioner who is a practical civil engineer, nor which will cause greater damage or injury to lands or materially greater length of road than the route designated by the corporation, nor which shall substantially change the general line adopted by the corporation. The commissioners shall, within thirty days after their appointment, make and certify their written determination, which with the petition, map, survey and profile, and any testimony taken before them, shall be immediately filed in the office of the county clerk of the county. Within twenty days after such filing, any party may, by written notice to the other appeal to the general term of the supreme court from the deci-

General Railroad Law of 1890.

sion of the commissioners, which appeal shall be heard and decided at the next term held in the department in which the lands of the petitioners or any of them are situated, for which the same can be noticed, according to the rules and practice of the court. On the hearing of such appeal, the court may affirm the route proposed by the corporation or may adopt that proposed by the petitioner. The commissioners shall each be entitled to six dollars per day for their services, and to their reasonable and necessary expenses, to be paid by the person who applied for their appointment. If the route of the road, as designated by the corporation, is altered by the commissioners, or by the order of the court, the corporation shall refund to the petitioner the amount so paid, unless the decision of the commissioners is reversed upon appeal taken by the corporation. No such corporation shall institute any proceedings for the condemnation of real property in any county until after the expiration of fifteen days from the service by it of the notice required by this section. Every such corporation shall transmit to the board of railroad commissioners the following maps, profiles and drawings exhibiting the characteristics of their road, to wit: A map or maps showing the length and direction of each straight line; the length and radius of each curve; the point of crossing of each town and county line, and the length of line of each town and county accurately determined by measurements to be taken after the completion of the road.

Whenever any part of the road is completed and used, such maps and profiles of such completed part shall be filed with such board within three months after the completion of any such portion and the commencement of its operation; and when any additional portion of the road shall be completed and used, other maps shall be filed within the same period of time, showing the additional parts so completed. If the route, as located upon the map and profile filed in the office of any county clerk, shall have been changed, it shall also cause a copy of the map and profile filed in the office of the railroad commissioners, so far as it may relate to the location in such county, to be filed in the office of the county clerk. (Thus amended by L. 1892, ch. 676.)

General Railroad Law of 1880.

§7. All real property, required by any railroad corporation for the purpose of its incorporation, shall be deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real property, or of any right, interest or easement therein, required for such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, it shall have the right to acquire title thereto by condemnation. * * * (Thus amended by L. 1892, ch. 676.)

§8. The commissioners of the land office may grant to any domestic railroad corporation any land belonging to the people of the state, except the reservation at Niagara and the Concourse lands on Coney Island, which may be required for the purposes of its road on such terms as may be agreed on by them; or such corporation may acquire title thereto by condemnation; and the county or town officers having charge of any land belonging to any county or town, required for such corporation for the purpose of its road, may grant such land to the corporation for such compensation as may be agreed upon.

§83. A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the State shall certify that in their opinion the public interests under all the circumstances do not require such extension. If such board shall so certify and shall file in their office such certificate, which certificate shall be irreversible by such board, such corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which has been constructed and operated, or apply to Kings County.

General Condemnation Law of 1890.

(CHAPTER 95 OF 1890.)

(Embodyed in Code of Civil Procedure as Chapter 23 thereof.)

§3357. This title shall be known as the condemnation law.

§3358. The term "person," when used herein, includes a natural person and also a corporation, joint-stock association, the state and a political division thereof, and any commission, board, board of managers or trustees in charge or having control of any of the charitable or other institutions of the state; the term "real property," any right, interest or easement therein or appurtenances thereto; and the term "owner," all persons having any estate, interest or easement in the property to be taken, or any lien, charge, or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought, the defendant. (Am'd by ch. 589 of 1896. In effect May 12, 1896.)

§3359. Whenever any person is authorized to acquire title to real property, for a public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title.

§3360. The proceeding shall be instituted by the presentation of a petition by the plaintiff to the supreme court setting forth the following facts: * * *

§3369. Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant the petition shall be dismissed, with costs to be taxed by the clerk at the same rates as are allowed, of course, to a defendant prevailing in an action in the supreme court, including the allowances for proceedings before and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use

General Condemnation Law of 1890.

specified, upon making compensation therefor, and the court shall thereupon appoint three disinterested and competent free-holders, residents of the judicial district embracing the county where the real property, or some part of it, is situated, or of some county adjoining such judicial district, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for the first meeting of the commissioners. * * *
(Thus amended by L. 1895, ch. 530.)

§3371. Upon filing the report of the commissioners, any party may move for its confirmation at a special term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceedings shall be had for the confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.

§3381. Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk's office of each county where any part of the property is situated; a notice of the pendency of the proceeding stating the names of the parties and the object of the proceeding,

General Condemnation Law of 1890.

and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken in the proceeding after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notices of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.

§3384. This title shall take effect on the first day of May, one thousand eight hundred and ninety, and shall not affect any proceeding previously commenced.

The Real Property Law.

CHAPTER 46 OF THE GENERAL LAWS.

Became a law May 12, 1896, taking effect October 1, 1896.

§207. *When written conveyance necessary.*—An estate or interest in real property, other than a lease for a term not exceeding one year * * * * cannot be created, granted, assigned, surrendered or declared unless by act or operation of law, or by a deed or conveyance in writing subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. * * * *

Special Legislation affecting Adirondack Company.

LAWS 1863, CHAP. 236.

AN ACT to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of this State, and the development of the resources thereof.

Passed April 27, 1863; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Albert N. Cheney may associate with him any number of persons, and make and file articles of association as prescribed by the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, for the purpose of constructing and operating a railroad from some point in the county of Saratoga up and along the valley of the upper Hudson into the wilderness in the northern part of this State; and when so organized such corporation shall have the rights and privileges given by said act and the acts amending the same, and be subject to the provisions thereof, except so far as the same are inconsistent with the provisions of this act.

§2. The said corporation, when so formed, may purchase, take and hold lands to the amount of one million of acres of lands in said wilderness in addition to the lands which it shall be authorized to take under the provisions of the said act, passed April second, eighteen hundred and fifty, and the acts amending the same; and all of said lands shall be free and exempt from all taxation until the twelfth day of September, eighteen hundred and eighty-three; but such exemption shall not extend or apply to the road bed or track of said corporation, nor to lands occupied or used for structures necessary to the working of its road, nor to any lands after the same shall be sold, or contracted to be sold by said corporation.

§3. The said corporation shall report annually, on the first Monday of January, to the State Engineer and Surveyor, the

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quantity of lands sold by it, with a description thereof and the names of the grantees of said lands.

§4. The said corporation, when so formed, shall be authorized during the period of its charter to convert and prepare for market the natural products of the forest and to mine and prepare for market the iron and other ores and minerals upon its lands, and to transport, sell and dispose of the same.

§5. Unless said corporation shall construct and put in operation at least twenty-five miles of its road by the first day of December, eighteen hundred and sixty-four, and thirty-five additional miles of its road by the first day of December, eighteen hundred and sixty-six, and twenty-five additional miles of its road by the first day of December, eighteen hundred and sixty-eight, the said exemptions from taxation shall cease, and said corporation shall not be entitled to said exemptions, unless on or before the first day of January, eighteen hundred and sixty-four, it shall deposit with the Comptroller of this State, in his name of office, a State of New York or United States stock, bearing at least five per cent. interest, to the amount of twenty thousand dollars at par, to be held as security for the taxes on the lands aforesaid from the year eighteen hundred and sixty-three to eighteen hundred and sixty-eight inclusive, in case said corporation shall not construct and put in operation the portions of its road in this section mentioned, but in case such portions of said road shall be so constructed and put in operation as before mentioned, the said stock shall be retransferred to said company, and the said company until default shall be made in the conditions aforesaid, shall be authorized to collect and receive the interest which may from time to time become payable on the said stock so transferred to the Comptroller as aforesaid, and the said Comptroller shall give to the said company the requisite authority to receive such interest. But nothing in this act contained shall be construed to make the State liable to pay any county, town, school or highway tax upon any of said lands hereby exempted from taxation.

§6. The evidence of the construction and operation of the railroad mentioned in the fifth section of this act, shall be the

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affidavit of the president, vice-president or chief engineer of said corporation, which shall be filed in the office of the State Engineer and Surveyor not more than ten days after the time limited for such construction.

§7. The said corporation shall not be required to finish its road and put it in operation, except as mentioned in the fifth section of this act, before the first day of January, eighteen hundred and seventy.

§8. This act shall take effect immediately.

Laws 1865, Chap. 60.

AN ACT to extend the time for the completion of the railroad of the Adirondack Company.

Passed February 28, 1865.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The several periods of time allowed to the Adirondack company, a corporation formed under and in pursuance of the act of April twenty-seventh, eighteen hundred and sixty-three, chapter two hundred and thirty-six, for constructing and putting in operation portions of the railroad of said company mentioned in the fifth section of said act, are hereby extended one year each; and said company, upon compliance with the terms of said fifth section as hereby modified, shall be entitled to all the rights, privileges and exemptions conferred by said act.

§2. This act shall take effect immediately.

Laws 1865, Chap. 250.

AN ACT to authorize the Adirondack Company to extend its railroad to Lake Ontario or River St. Lawrence, and to increase its capital stock.

Passed March 31, 1865.

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The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Adirondack Company is hereby authorized to amend its articles of association so as to enable it, under the general law, to extend its railroad to some point on Lake Ontario or River St. Lawrence, and to increase its capital stock to such an amount as may be necessary for that purpose, not to exceed five millions of dollars additional capital.

§2. This act shall take effect immediately.

Laws 1868, CHAP. 718.

AN ACT to amend an act entitled "An act to encourage and facilitate the construction of a railroad along the valley of the Upper Hudson, into the wilderness in the northern part of this State, and the development of the resources thereof," passed April twenty-seventh, eighteen hundred and sixty-three, and for the relief of the Adirondack Company formed under said act.

Passed May 8, 1868; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The time allowed the Adirondack Company to construct the thirty-five miles of its road, mentioned in section five of chapter two hundred and thirty-six of the laws of eighteen hundred and sixty-three, is extended to the thirty-first day of December, eighteen hundred and seventy, and if said company shall construct one-third of said thirty-five miles of road in each of the years eighteen hundred and sixty-eight, eighteen hundred and sixty-nine and eighteen hundred and seventy, continuous by northward from the present northern extremity of the twenty-five miles of said road already constructed, it shall be relieved from all forfeitures imposed by said act, and shall be entitled to all the rights and privileges, exemptions and franchises granted by said act; but in case said company shall fail

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to construct and complete by the thirty-first day of December, eighteen hundred and sixty-eight, one-third of said thirty-five miles of its road, northward from its present terminus, this act shall be of no force and effect, anything herein contained to the contrary notwithstanding.

§2. The twenty United States government bonds deposited with the Comptroller of the State, pursuant to section five of said act, shall remain in his hands as security for the taxes upon the lands mentioned in said act for the years eighteen hundred and sixty-three to eighteen hundred and seventy, inclusive, in case said corporation shall not complete said thirty-five miles of its road, as provided by the first section of this act; but in case said thirty-five miles of road shall be constructed, the said bonds shall be transferred to said company, and until default shall be made in the performance of the conditions aforesaid, said company shall be authorized to collect and receive the interest on said bonds, and the Comptroller shall give to said company the requisite authority to receive the said interest.

§3. The said company may construct a branch of its road from some point on its line between the north line of the town of Thurman in the county of Warren and the southerly line of the county of Essex, to connect with the Whitehall and Plattsburgh railroad, at some point in the county of Essex, and so much of said branch railroad as shall be constructed by said company, continuously northward from the main line of said company's road, shall be deemed a part of the thirty-five miles of the road required to be built by the first and second sections of this act, and of the eighty-five miles of said road required to be built by chapter two hundred and thirty-six of the laws of eighteen hundred and sixty-three.

§4. This act shall take effect immediately.

Special Legislation, Adirondack Company.

LAWS 1868, CHAP. 850.

AN ACT declaring certain lands not exempt from taxation, and providing for the payment of the taxes due thereon from the years eighteen hundred and sixty-three to eighteen hundred and sixty-eight inclusive.

Passed June 2, 1868; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The lands in the several counties of this State now or late belonging to the corporation authorized to be formed under chapter two hundred and thirty-six of the Laws of eighteen hundred and sixty-three, and which is now known as the Adirondack Railroad Company, and which, under said chapter two hundred and thirty-six of said Laws of eighteen hundred and sixty-three, under certain conditions, were declared to be exempt and free from all taxation until the year eighteen hundred and eighty-three, shall hereafter not be exempt from taxation, and the same are hereby declared to be subject to State, town, county, school and highway taxation, the same as other real property in this State, in case the provisions of section four are not complied with.

§2. The amount of twenty thousand dollars in the State of New York or United States stocks, which was deposited by said corporation with the Comptroller of this State as security for the taxes on their lands authorized to be held under said act, from the years eighteen hundred and sixty-three to eighteen hundred and sixty-eight inclusive, shall be held and retained by said Comptroller, and devoted to the payment of the State, county, town, school and highway taxes, which, but for the exemption under the provisions of said chapter two hundred and thirty-six of the Laws of eighteen hundred and sixty-three, would have been levied upon and collected out of said lands.

§3. The said Comptroller shall, within two months after this act shall take effect, ascertain the amount of State tax which

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would have been assessed upon any and all of said lands from the years eighteen hundred and sixty-three to eighteen hundred and sixty-eight respectively; and also what amount of tax for county, town, school and highway purposes which ought respectively to have been assessed upon any or all of said lands, and that he make a report to the legislature, in order that such legislation may be had as may be necessary to secure the payment of such taxes out of such fund to the State, county and town officers who may be by law authorized to receive the same.

§4. This act shall take effect on the thirty-first day of December, eighteen hundred and sixty-eight, unless said company shall construct and complete twelve miles of its road, northward from its present terminus, in which case this act shall take effect on the thirty-first day of December, eighteen hundred and sixty-nine, unless said company shall construct and complete twelve miles more of its road, northward from its then present terminus, in which case this act shall take effect on the thirty-first day of December, eighteen hundred and seventy, unless the said company shall construct and complete eleven miles more of its road, northward from the then terminus, being the twenty-four miles above specified. And if the said company shall so construct said thirty-five miles as prescribed by this section, then said company shall be entitled to all the rights, privileges, exemptions and franchises granted by chapter two hundred and thirty-six of the laws of eighteen hundred and sixty-three.

Laws 1871, Chap. 857.

An ACT to amend an act entitled, "An act to amend an act to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness, in the northern part of this State, and the development of the resources thereof," passed April twenty-seventh, eighteen hundred and sixty-three, and for the relief of the Adirondack Company, formed under said act, passed May eighth, eighteen hundred and sixty-eight.

Passed April 28, 1871; three-fifths being present.

Special Legislation, Adirondack Company.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section three of an act entitled "An act to amend an act to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness, in the northern part of this State, and the development of the resources thereof," passed April twenty-seventh, eighteen hundred and sixty-three, and for the relief of the Adirondack Company, formed under said act, passed May eighth, eighteen hundred and sixty-eight, is hereby amended by striking out the following words, to wit: "and the southerly line of the county of Essex," and inserting in lieu thereof the following words, to wit: "and the north line of the town of Newcomb, in the county of Essex."

§2. This act shall take effect immediately.

Laws 1872, CHAP. 864.

AN ACT to authorize the Adirondack Company to construct and operate a branch of its railroad from its main line to the north bounds of the State.

Passed May 31, 1872.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Adirondack Company is hereby authorized to construct and operate a branch of its railroad, commencing at some point at its line between the south line of the town of Thurman, in the county of Warren, and the north line of the town of Newcomb, in the county of Essex, and running to the north bounds of this State, in either of the towns of Mooers or Champlain, in the county of Clinton.

§2. This act shall take effect immediately.

Special Legislation, Adirondack Company.

Laws 1873, Chap. 695.

AN ACT authorizing the Adirondack Company to build a branch railroad to the village of Caldwell.

Passed June 10, 1873.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Adirondack Company is hereby authorized and empowered to build a branch railroad from their railroad in the town of Hadley to the village of Caldwell, at the head of Lake George, and to charge not to exceed one dollar for each passenger carried over such extension.

2. All the laws applicable to the said Adirondack Company's railroad are hereby made applicable to said extension.

3. This act shall take effect immediately.

Forest Legislation.

Laws 1885, Chap. 283.

AN ACT to establish a forest commission, and to define its powers and duties and for the preservation of forests.

Passed May 15, 1885; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. There shall be a forest commission which shall consist of three persons who shall be styled forest commissioners, and who may be removed by the governor for cause. The forest commissioners shall be appointed by the governor by and with the advice and consent of the Senate.

§7. All the lands now owned or which may hereafter be acquired by the State of New York, within the Counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, shall constitute and be known as the forest preserve.

§8. The lands now or hereafter constituting the forest preserves shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private.

§9. The forest commission shall have the care, custody, control and superintendence of the forest preserve. It shall be the duty of the commission to maintain and protect the forests now on the forest preserve, and to promote as far as practicable the further growth of forests thereon. It shall also have charge of the public interests of the state, with regard to forest and tree planting, and especially with reference to forest fires in every part of the state. It shall have as to all lands now or hereafter included in the forest preserve, but subject to the provisions of this act, all the powers now vested in the commissioners of the land office and in the comptroller as to such of the said lands as are now owned by the state. The forest commission may, from time to time, prescribe rules or regulations

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and may, from time to time alter or amend the same, affecting the whole or any part of the forest preserve, and for its use, care and administration; but neither such rules or regulations, nor anything herein contained shall prevent or operate to prevent the free use of any road, stream or water as the same may have been heretofore used or as may be reasonably required in the prosecution of any lawful business.

§25. Every railroad company whose road passes through waste or forest lands, or lands liable to be overrun by fires within this State, shall twice in each year cut and burn off or remove from its right of way all grass, brush or other inflammable material, but under proper care, and at times when the fires thus set are not liable to spread beyond control.

§26. All locomotives which shall be run through forest lands shall be provided, within one year from the date of this act, with approved and sufficient arrangements for preventing the escape of fire from their furnace or ash-pan, and netting of steel or iron wire upon their smoke-stack to check the escape of sparks of fire. It shall be the duty of every engineer and fireman employed upon a locomotive, to see that the appliances for the prevention of the escape of fire are in use and applied, as far as it can be reasonably and possibly done.

§27. No railroad company shall permit its employees to deposit fire-coals or ashes upon their track in the immediate vicinity of woodlands or lands liable to be overrun by fires, and in all cases where any engineers, conductors or trainmen discover that fences along the right of way, on woodlands adjacent to the railroad, are burning, or in danger from fire, it shall be their duty to report the same at their next stopping place, and the person in charge of such station shall take prompt measures for extinguishing such fires.

§28. In seasons of drought, and especially during the first dry time in the spring after the snows have gone and before vegetation has revived, railroad companies shall employ a sufficient additional number of trackmen for the prompt extinguishment of fires. And where a forest fire is raging near the

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line of their road they shall concentrate such help and adopt such measures as shall most effectually arrest their progress.

§32. Fifteen thousand dollars is hereby appropriated out of any moneys in the treasury not otherwise appropriated, for the purposes of this act. And no liabilities shall be incurred by said forest commissioners in excess of this appropriation.

LAWS OF 1892, CHAP. 707.

AN ACT to establish the Adirondack park and to authorize the purchase and sale of lands within the counties including the forest preserve.

Approved by the Governor May 20, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§1. There shall be a state park established within the counties of Hamilton, Herkimer, St. Lawrence, Franklin, Essex and Warren, which shall be known as the Adirondack park, and which shall, subject to the provisions of this act, be forever reserved, maintained and cared for as ground open for the free use of the people for their health or pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state, and a future timber supply.

§2. For this purpose the forest commission shall have power, as herein provided, to contract for the purchase of land situated within the County of Hamilton; the towns of Newcomb, Minerva, Schroon, North Hudson, Keene, North Elba, St. Armand and Wilmington, in the county of Essex; the towns of Harriets-town, Santa Clara, Altamont, Waverly and Brighton, in the county of Franklin; the town of Wilmurt, in the county of Herkimer; the towns of Hopkinton, Colton, Clifton and Fine, in the county of St. Lawrence; and the towns of Johnsburg, Stony Creek and Thurman, in the county of Warren.

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§3. In any case where lands are situated within the towns specified in section two, the purchase of which lands will, in the opinion of the forest commission, be advantageous to the state, but which can not, as shall appear to the satisfaction of the forest commission, be bought on advantageous terms, unless subject to leases or restrictions or to the right to remove certain timber as hereinafter mentioned, the forest commission may make a contract for the purchase of such lands, providing that the contract and the deed or deeds to be made in pursuance thereof shall be subject to such leases, restrictions or right. But no lands shall be so purchased subject to any right to remove hard wood timber, or any trees of soft wood with a diameter of less than ten inches at the height of three feet from the ground, or subject to any rights, leases or restrictions, or the right to remove any timber after the period of ten years from the date of the conveyance.

§4. The forest commission shall have power, from time to time, due notice having been given, to contract to sell and convey any portion of the lands within so much of the forest preserve as is now or hereafter may be situated within the counties of Clinton, Fulton, Lewis, Oneida, Saratoga, Washington, St. Lawrence, Franklin (except the town of Harrietstown), Herkimer (except the town of Wilmurt), Essex (except the towns of Newcomb and North Elba), the town of Hope, in the county of Hamilton, and the county of Warren, (excepting, however, therefrom, all the islands in Lake George and all land upon the shore thereof), the ownership of which by the state is not, in the opinion of the forest commission needed to promote the purpose sought by this act, or by chapter two hundred and eighty-three of the laws of eighteen hundred and eighty-five. The proceeds of all such sales, as in this section provided, shall be paid to the treasurer of the state, and * * * *

§10. Except as in this act otherwise provided, the Adirondack park shall for all purposes, be deemed a part of the forest preserve. All laws for the protection of the forest preserve shall be applicable to the Adirondack park, except as in this act otherwise provided; and the forest commission may conduct the same prosecutions, and institute and maintain the same pro-

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ceedings, which it is, or shall be, entitled to conduct, institute or maintain with reference to any portion of the forest preserve; and all acts forbidden upon the forest preserve are, and shall be deemed forbidden within the Adirondack park except as herein otherwise provided; and all violations of law upon the Adirondack park shall be subject to the same punishments and penalties as if such violation were committed upon any part of the forest preserve.

§14. This act shall take effect immediately.

LAWS OF 1893, CHAP. 332.

AN ACT in relation to the forest preserve and Adirondack park, constituting articles six and seven of chapter forty-three of the general laws.

Approved by the Governor April 7, 1893. Passed, three-fifths present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

ARTICLE VI.

FOREST PRESERVE.

§100. **FOREST PRESERVE.** The forest preserve shall include the lands now owned or hereafter acquired by the state within the counties of Clinton, except the towns of Altona and Dannemora, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except

1. Lands within the limits of any village or city and
2. Lands, not wild lands, acquired by the state on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States usually called the United States deposit fund.

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§101. FOREST COMMISSION. There shall be a forest commission consisting of five persons to be known as the forest commissioners, appointed by the governor by and with the advice and consent of the senate and holding office for the term of five years.

* * * * *

§102. POWERS AND DUTIES. The forest commission shall:

1. Have the care, custody, control and superintendence of the forest preserve.
2. Maintain and protect the forests in the forest preserve and promote as far as practicable the further growth of the forest therein.
3. Have charge of the public interests of the state with regard to forestry and tree planting and especially with reference to forest fires in every part of the state.
4. Possess all the powers relating to forest preserve which were vested in the commissioners of the land office and in the comptroller on May fifteen, eighteen hundred and eighty-five.

* * * * *

§103. SALE OF TIMBER ON FOREST PRESERVE. The forest commissioners may sell any spruce and tamarack timber, which is not less than twelve inches in diameter at a height of three feet above the ground, standing in any part of the forest preserve, and poplar timber of such size as the forest commission may determine and the proceeds of such sales shall be turned over to the state treasurer, by whom they shall be placed to the credit of the special fund established for the purchase of lands within the Adirondack park.

§107. DUTIES OF RAILROAD COMPANIES. Every railroad company whose road passes through waste or forest lands or lands liable to be overrun by fires within the state, shall twice in each year cut and remove from its right of way all grass, brush or other inflammable materials, but under proper care and at proper times when fire, if set, can be kept under control. All locomotives which run through forest lands shall be provided

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with approved and sufficient arrangements for preventing the escape of fire from their furnaces or ashpans and with netting of steel or iron wire upon their smoke stacks to prevent the escape of sparks of fire and every engineer and fireman employed upon a locomotive shall see that the appliances to prevent the escape of fire are in use and applied as far as it can be reasonably and practically done. No railroad company shall permit its employes to deposit fire coals or ashes upon their track in the immediate vicinity of wood lands, or lands liable to be overrun by fires, and where any engineers, conductors or trainmen discover that fences or other material or substances along the right of way upon wood lands adjacent to the railroad are burning, or in danger from fire, they shall report the same at their next stopping place, and the person in charge of such station shall take prompt measures to extinguish such fires and shall immediately notify the nearest firewarden or forester. In seasons of drought and especially during the first dry time in the spring after the snows have gone and before vegetation has revived, railroad companies shall employ a sufficient number of trackmen for the prompt extinguishment of fires; and where a forest fire is raging near the line of their road, they shall concentrate such help and adopt such measures as shall most effectually arrest its progress. If any railroad company or any of its employes violate any provision of this section the company shall forfeit to the people of the state the sum of one hundred dollars for every such violation.

ARTICLE VII.**ADIRONDACK PARK.**

§120. **ADIRONDACK PARK.** All lands now owned or hereafter acquired by the state within the county of Hamilton; the towns of Newcomb, Minerva, Schroon, North Hudson, Keene, North Elba, Saint Armand and Wilmington, in the county of Essex; the towns of Harrietstown, Santa Clara, Altamont, Waverly and Brighton, in the County of Franklin; the town of Wilmurt, in the county of Herkimer; the towns of Hopkington, Colton, Clifton and Fine, in the county of Saint Lawrence, and in the towns of Johnsburgh, Stony Creek, and

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Thurman, and the islands in Lake George, in the county of Warren, except such lands as may be sold as provided in this article, shall constitute the Adirondack park. Such park shall be forever reserved, maintained and cared for as ground open for the free use of all the people for their health and pleasure and as forest lands, necessary to the preservation of the headwaters of the chief rivers of the state, and a future timber supply; and shall remain part of the forest preserve.

§121. POWERS AND DUTIES OF FOREST COMMISSION. The forest commission shall have the care, custody, control and superintendence of the Adirondack park, and within the same and with reference thereto and to acts committed therein and to persons committing the same, all the control, powers, duties, rights of action and remedies belonging to such commission or the commissioners of the land office within and with reference to the forest preserve as to acts committed therein and persons committing the same. The forest commission shall have power:

* * * * *

§126. LAWS REPEALED. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed.

§127. WHEN TO TAKE EFFECT. This chapter shall take effect immediately.

Schedule of Laws Repealed.

Laws of	Chapter	Sections
* * * * *	* * * * *	* * * * *
1885.	283.	All.

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Forest Legislation.

LAWS 1895, CHAP. 395.

AN ACT to amend the game law and to repeal chapter three hundred and thirty-two of the laws of eighteen hundred and ninety-three, entitled "An act in relation to the forest preserve and Adirondack park, constituting articles six and seven of chapter forty-three of the general laws."

Became a law April 25, 1895, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§1. The title to chapter four hundred and eighty-eight of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

"An act relating to game, fish and wild animals and to the forest preserve and Adirondack park, constituting chapter thirty-one of the general laws and to be known as the fisheries, game and forest law."

* * * * *

ARTICLE I.

FISHERIES, GAME AND FOREST COMMISSION.

§1. SHORT TITLE OF CHAPTER.—This chapter shall be known as the fisheries, game and forest law.

§2. FISHERIES, GAME AND FOREST COMMISSIONERS; HOW APPOINTED.—The governor shall appoint, by and with advice and consent of the Senate, five commissioners who shall constitute the board of fisheries, game and forest.

* * * * *

ARTICLE XII.

FOREST PRESERVE.

§270. FOREST PRESERVE.—The forest preserve shall include the lands owned or hereafter acquired by the State within the

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counties of Clinton, except the towns of Altona and Dannemora, Deleware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except

1. Lands within the limits of any village or city and
2. Lands, not wild lands, acquired by the State on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States, usually called the United States deposit fund.

§271. POWERS AND DUTIES.—The board of fisheries, game and forest, shall:

1. Have the care, custody, control and superintendence of the forest preserve.
2. Maintain and protect the forests in the forest preserve, and promote as far as practicable the further growth of the forest therein.
3. Have charge of the public interests of the State with regard to forestry and tree planting, and especially with reference to forest fires in every part of the State.
4. Possess all the powers relating to forest preserve which were vested in the commissioners of the land office, and in the comptroller on May fifteen, eighteen hundred and eighty-five.

* * * * *

§275. DUTIES OF RAILROAD COMPANIES.—Every railroad company whose road passes through waste or forest lands or lands liable to be overrun by fires within the State, shall twice in each year cut and remove from its right of way all grass, brush or other inflammable materials, but under proper care and at proper times when fire, if set, can be kept under control. All locomotives which run through forest lands shall be provided with approved and sufficient arrangements for preventing the escape of fires from their furnaces or ashpans, and with netting of steel or iron wire upon their smoke stacks to prevent the escape of sparks of fire, and every engineer and fireman employed upon a locomotive shall see that the appliances to prevent the

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escape of fire are in use and applied as far as it can be reasonably and practically done. No railroad company shall permit its employees to deposit fire coals or ashes upon their track in the immediate vicinity of woodlands, or lands liable to be overrun by fires, and where any engineers, conductors or trainmen discover that fences or other material or substances along the right of way upon woodlands adjacent to the railroad are burning, or in danger from fire, they shall report the same at their next stopping place, and the person in charge of such station shall take prompt measures to extinguish such fires, and shall immediately notify the nearest fire warden or fish and game protector and forester. In seasons of drought and especially during the first dry time in the spring after the snows have gone, and before vegetation has revived, railroad companies shall employ a sufficient number of trackmen for the prompt extinguishment of fires; and where a forest fire is raging near the line of their road they shall concentrate such help and adopt such measures as shall most effectually arrest its progress. If any railroad company or any of its employees violate any provision of this section the company shall forfeit to the people of the State the sum of one hundred dollars for every such violation.

ARTICLE XIII.

ADIRONDACK PARK.

§290. ADIRONDACK PARK.—All lands now owned or hereafter acquired by the State within the county of Hamilton; the towns of Newcomb, Minerva, Schroon, North Hudson, Keene, North Elba, Saint Armand and Wilmington, in the county of Essex; the towns of Harrietstown, Santa Clara, Altamont, Waverley and Brighton, in the county of Franklin; the town of Wilmurt, in the county of Herkimer; the towns of Hopkington, Colton, Clifton and Fine, in the county of Saint Lawrence, and the towns of Johnsburgh, Stony Creek, and Thurman, and the islands in Lake George, in the county of Warren; except such lands as may be sold as provided in this article, shall constitute the Adirondack Park. Such part shall be forever reserved, maintained and cared for as ground open for the free

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use of all the people for their health and pleasure and as forest lands, necessary to the preservation of the headwaters of the chief rivers of the State, and a future timber supply; and shall remain part of the forest preserve.

§291. POWERS AND DUTIES OF FOREST COMMISSION.—The board of fisheries, game and forest shall have the care, custody, control and superintendence of the Adirondack park, and within the same and with reference thereto and to acts committed therein and to persons committing the same, all the control, powers, duties, rights of action and remedies belonging to such board or the commissioners of the land office within and with reference to the forest preserve as to acts committed therein and persons committing the same. The board of fisheries, game and forest shall have power:

* * * * *

§295. * * *

5. Chapter three hundred and thirty-two of the laws of eighteen hundred and ninety-three, * * * and * * * are hereby repealed.

Forest Legislation.

Laws of 1897, Chap. 220.

AN ACT to provide for the acquisition of land in the territory embraced in the Adirondack park and making an appropriation therefor.

Became a law April 8, 1897, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The governor, within twenty days after this act takes effect, shall appoint from the commissioners of fisheries, game and forest and the commissioners of the land office, by and with the advice and consent of the senate, three persons to constitute a board to be known as "the forest preserve board." The members of such board may be removed by the governor at his pleasure. Vacancies shall be filled in like manner as an original appointment. The members of the board shall not receive any compensation for their services under this act, but shall receive their actual and necessary expenses to be audited by the comptroller. The board may employ such clerical and other assistants as it may deem necessary. The forest preserve board annually in the month of January shall make a written report to the governor showing in detail all its transactions under this act during the preceding calendar year.

§2. It shall be the duty of the forest preserve board and it is hereby authorized to acquire for the state, by purchase or otherwise, land, structures or waters or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game and forest law, as it may deem advisable for the interests of the state.

§3. The forest preserve board may enter on and take possession of any land, structures and waters in the territory embraced in the Adirondack Park, the appropriation of which in its judgment shall be necessary for the purposes specified in section two hundred and ninety of the fisheries, game and forest law, and in section seven of article seven of the constitution.

Laws 1897, Chap. 220.

§4. Upon the request of the forest preserve board an accurate description of such lands so to be appropriated shall be made by the state engineer and surveyor, or the superintendent of the state land survey, and certified by him to be correct, and such board or a majority thereof shall indorse on such description a certificate stating that the lands described therein have been appropriated by the state for the purpose of making them a part of the Adirondack park; and such description and certificate shall be filed in the office of the secretary of state. The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service the entry upon and appropriation by the state of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the state. Such notice shall be conclusive evidence of an entry and appropriation by the state. The forest preserve board may cause duplicates of such notice with an affidavit of due service thereof on such owner to be recorded in the books used for recording deeds in the office of the clerk of any county of this state where any of the property described therein may be situated, and the record of such notice and of such proof of service shall be evidence of the due service thereof.

§5. Claims for the value of the property taken and for damages caused by any such appropriation may be adjusted by the forest preserve board if the amount thereof can be agreed upon with the owners of the land appropriated. The board may enter into an agreement with the owner of any land so taken and appropriated, for the value thereof, and for any damages resulting from such appropriation. Upon making such agreement the board shall deliver to the owner a certificate stating the amount due to him on account of such appropriation of his lands, and a duplicate of such certificate shall also be delivered to the comptroller. The amount so fixed shall be paid by the treasurer upon the warrant of the comptroller.

Laws 1897, Chap. 220.

§6. If the forest preserve board is unable to agree with the owner for the value of property so taken or appropriated, or on the amount of damages resulting therefrom, such owner, within two years after the service upon him of the notice of appropriation as above specified, may present to the court of claims a claim for the value of such land and for such damages, and the court of claims shall have jurisdiction to hear and determine such claims and render judgment thereon. Upon filing in the office of the comptroller a certified copy of the final judgment of the court of claims, and a certificate of the attorney-general that no appeal from such judgment has been or will be taken by the state, or, if an appeal has been taken a certified copy of the final judgment of the appellate court, affirming in whole or in part the judgment of the court of claims, the comptroller shall issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount shall be paid by the treasurer.

§7. The owner of land to be taken under this act may, at his option, within the limitations hereinafter prescribed, reserve the spruce timber thereon ten inches or more in diameter at a height of three feet above the ground. Such option must be exercised within six months after the service upon him of a notice of the appropriation of such land by the forest preserve board, by serving upon such board a written notice that he elects to reserve the spruce timber thereon. If such a notice be not served by the owner within the time above specified, he shall be deemed to have waived his right to such reservation, and such timber shall thereupon become and be the property of the state. In case land is acquired by purchase, the spruce timber and no other may be reserved by agreement between the board and the owner, subject to all the provisions of this act in relation to timber reserved after an appropriation of land by the forest preserve board. The presentation of a claim to the court of claims before the service of a notice of reservation, shall be deemed a waiver of the right to such reservation.

§8. The reservation of timber and the manner of exercising

Laws 1897, Chap. 220.

and consummating such right are subject to the following restrictions, limitations and conditions:

1. The reservation does not include or affect timber within twenty rods of a lake, pond or river, and such timber cannot be reserved. Roads may be cut or built across or through such reserved space of twenty rods, under the supervision of the forest preserve board, for the purpose of removing spruce timber from adjoining land, and the reservation of spruce timber within such space shall be deemed a reservation by the owner, his assignee or representative, of the right to cut other timber necessary in constructing such road, but such reservation does not confer a right to remove such other timber so cut, or to use it otherwise than in constructing a road.

2. The timber reserved must be removed from the land within fifteen years after the service of notice of reservation, or the making of an agreement subject to regulations to be prescribed by the forest preserve board; but such land shall not be cut over more than once, and the said board may prescribe regulations for the purpose of enforcing this limitation. All timber reserved and not removed from the land within such time shall thereupon become and be the property of the state, and all the title or claim thereto by the original owner, his assigns or representatives, shall thereupon be deemed abandoned.

§9. A person who reserves timber as herein provided is not entitled to any compensation for the value of his land purchased or taken and appropriated by the state, nor for any damages caused thereby, until:

1. The timber so reserved is all removed and the object of the reservation fully consummated; or

2. The time limited for the removal of such timber has fully elapsed, or the right to remove any more timber is waived by a written instrument filed with the forest preserve board; and

3. The forest preserve board is satisfied that no trespass on state lands has been committed by such owner or his assigns or representatives; that no timber or other property of the state not so reserved has been taken, removed, destroyed or injured by him or them, and that a cause of action in behalf of the state

Laws 1897, Chap. 220.

does not exist against him or them for any alleged trespass or other injury to the property or interests of the state; and

4. That the owner, his assignee, or other representative has fully complied with all rules, regulations and requirements of the forest preserve board concerning the use of streams or other property of the state for the purpose of removing such timber.

§10. A warrant shall not be drawn by the comptroller for the amount of compensation agreed upon between the owner and the forest preserve board, nor for the amount of a judgment rendered by the court of claims, until a further certificate by the board is filed with him to the effect that the owner has not reserved any timber or that he, his assignee, or other representative, has complied with the provisions of this act, or has otherwise become entitled to receive the amount of the purchase price, award or judgment.

§11. The forest preserve board may settle and adjust any claims for damages due to the state on account of any trespasses or other injuries to property or interests of the state, or penalties incurred by reason of such trespasses or otherwise, and the amount of such damages or penalties so adjusted shall be deducted from the original compensation agreed to be paid for the lands, or for damages, or from a judgment rendered by the court of claims on account of the appropriation of such land. A judgment recovered by the state for such a trespass or for a penalty shall likewise be deducted from the amount of such compensation or judgment.

§12. If timber is reserved upon land purchased or appropriated as provided by this act, interest is not payable upon the purchase price or the compensation which may be awarded for the value of such land or for damages caused by such appropriation, except as provided in section six.

§13. Persons entitled to cut and remove timber under this act may use streams or other waters belonging to the state within the forest preserve for the purpose of removing such timber, under such regulations and conditions as may be prescribed or imposed by the forest preserve board. The persons using such waters shall be liable for all damages caused by such use.

Laws 1897, Chap. 220.

§14. If timber be reserved, its value at the time of making an agreement between the owner and the forest preserve board for the value of the land so appropriated and the damages caused thereby, or at the time of the presentation to the court of claims of a claim for such value and damages, shall be taken into consideration in determining the compensation to be awarded to the owner on account of such appropriation either by such agreement or by the judgment rendered upon such a claim.

§17. The forest preserve board shall take such measures as may be necessary or proper to perfect the title to any lands in the forest preserve now held by the state, and for that purpose may pay and discharge any valid lien or incumbrance upon such land, or may acquire any outstanding or apparent right, title, claim or interest which, in its judgment, constitutes a cloud on such title. The amounts necessary for the purposes of this section shall be paid by the treasurer upon the certificate of the board and the audit and warrant of the comptroller.

§19. When a judgment for damages is rendered for the appropriation of any lands or waters for the purposes specified in this act, and it appears that there is any lien or incumbrance upon the property so appropriated, the amount of such lien shall be stated in the judgment, and the comptroller may deposit the amount awarded to the claimant in any bank in which moneys belonging to the state may be deposited, to the account of such judgment, to be paid and distributed to the persons entitled to the same as directed by the judgment.

§21. Service of a notice by the forest preserve board under section four must be personal if the person to be served can be found in the state. The provisions of the code of civil procedure relating to the service of a summons in an action in the supreme court, except as to publication, apply, so far as practicable, to the service of such a notice. If a person to be served can not with due diligence be found in the state, a justice of the supreme court may, by order, direct the manner of such service, and service shall be made accordingly.

Laws 1897, Chap. 220.

§22. The court of claims, if requested by the claimant or the attorney-general, shall examine the real property affected by the claim and take the testimony in relation thereto in the county where such property or a part thereof is situated. The actual and necessary expenses of each judge and of each officer of the court in making such examination and in so taking testimony shall be audited by the comptroller and paid from the money appropriated for the purposes of this act.

§23. The power to appropriate real property, vested in the forest preserve board by section four, is subject to the following limitations: Such real property must adjoin land already owned or appropriated by the state at the time the description and certificate are filed in the office of the secretary of state, except that timber land not so adjoining state land may be appropriated whenever in the judgment of the board timber thereon other than spruce, pine or hemlock is being cut or removed to the detriment of the forest, or the interests of the state.

§24. The sum of six hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated for the purposes specified in this act, out of any moneys in the treasury not otherwise appropriated. In addition to the amount above appropriated, the comptroller, upon the written request of the forest preserve board, is hereby authorized and directed to borrow, from time to time, not exceeding in the aggregate the sum of four hundred thousand dollars for the purposes specified in this act, and to issue bonds or certificates therefor payable within ten years from their date, bearing interest at a rate not exceeding five per centum per annum, and which shall not be sold at less than par. The sums so borrowed are hereby appropriated, payable out of the moneys realized from the sale of such bonds or certificates, to be expended under the direction of the forest preserve board for the purposes of this act, and to be paid by the treasurer on the warrant of the comptroller.

§25. All acts and parts of acts inconsistent with this act are hereby repealed.

§26. This act shall take effect immediately.



N^o. 439.

United Supreme Court of the

FILED

JAN 11 1900

JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States,

Brief of Paige for D. C.
OCTOBER TERM, 1899.
No. 439.

THE ADIRONDACK COMPANY
Filed January Plaintiff in Error,
against

THE PEOPLE OF THE STATE OF
NEW YORK.

BRIEF FOR THE PEOPLE OF THE
STATE OF NEW YORK.



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Supreme Court of the United States.

THE ADIRONDACK RAILWAY COM-

PANY,

Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF

NEW YORK.

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK.

ABSTRACT OR STATEMENT OF THE CASE.

FIRST HEAD: The writ of error and appeals.

The writ of error brings up a judgment of the Court of Appeals of New York affirming a final judgment of the Supreme Court of New York, which perpetually enjoined the plaintiff in error from taking certain lands by condemnation proceedings.

The plaintiff in error had begun condemnation proceedings to take part of Township 15, T. & C., in New York.

The People of the State of New York brought this action to perpetually enjoin those proceedings.

At the Special Term of the Supreme Court they had such a judgment.

Upon appeal by the plaintiff to the Appellate Division

of the Supreme Court the judgment was reversed and a new trial ordered (39 App. Div., 34; R. 74).

Upon appeal by the People of the State of New York to the Court of Appeals of New York, that order was reversed and the judgment affirmed (160 N. Y., 225; R. 93).

The plaintiff in error thereupon sued out the present writ.

SECOND HEAD : Facts down to the decision of the Appellate Division of the Supreme Court of New York in Adirondack Railway Company vs. Indian River Company, 27 App. Div., 326. (Opinions attached to this brief.)

On the 6th of August, 1897, the Forest Preserve Board passed a resolution in the following words :

“ *Resolved*, That we accept the offer of Mr. Mc-
“ Echron and the other owners of about 18,000 acres
“ of Township 32, T. & C., and 24,000 acres of Town-
“ ship 15 of the same purchase, including in this total
“ acreage 8,000 acres, more or less, of the virgin forest
“ land, the major portion of the balance of said town-
“ ships being well wooded but lumbered of the soft
“ timber, for the sum of \$149,000.

“ The above offer to include, and carry with it,
“ Indian Lake (subject to the right of the grantors to
“ control the waters thereof so long as they maintain
“ the structures at the outlet), and the improvements
“ and structures at the outlet thereof both existing
“ and in course of construction, and the grubbing,
“ acquiring and clearing of the shores thereof, which
“ shall hereafter be conducted in accordance with the

“ plans and specifications to be furnished by the State
“ engineer and surveyor.

“ If the cost of such structures, improvements,
“ acquiring and grubbing and clearing up the shores
“ of said lake under the plans and specifications of
“ the State engineer be in excess of \$50,000, such
“ excess shall be added to said purchase price; and if
“ less than \$50,000, the difference shall be deducted
“ therefrom.”

(Admitted—Answer, R. 5, 31.)

“ Township 15, T. & C.,” is within the “ forest pre-
“ serve ” as the same had been established by law at the
adoption of the provision of the Constitution presently to
be quoted (*post*, p. 10) and it is also within the “ Adiron-
dack Park.” (Answer, R. 31).

Directly after the acceptance of the offer of McEchron
and others by the above resolution, the People of the
State of New York took possession of the land, sending a
surveyor’s force to survey for a dam at the mouth of
Indian Lake, with a view to store the water for the use of
the Champlain Canal and for water power on the Hudson
River (R. 57-58).

This was as early as the eighteenth of August (R. 58).

The survey completed, the State Engineer prepared
plans and specifications for the construction of the dam,
“ right after ” the survey (R. 58), and the construction of
the dam was immediately begun (R. 59), and it is to cost
sixty-five thousand dollars (R. 59).

On the eighteenth of September the Adirondack Rail-
way Company filed in the counties of Hamilton, Warren
and Essex, in all of which counties Township fifteen is, a
map and survey for the extension of its railroad across
Township fifteen, and, of course, across the lands which

the Forest Preserve Board had agreed to purchase from McEchron and others, as above stated (R. 32).

On the first of October McEchron and the others were about to convey to the State Township fifteen and the eighteen thousand acres of thirty-two, and to receive their money, when they were stopped by the injunction printed at page 8 of the Record.

They thereupon did this: they put up the deed in escrow, to be delivered when the injunction was dissolved. They made and delivered another deed—*excepting* the land described in the railroad survey—and delivered it, and the People of the State of New York paid them ninety-nine thousand dollars, the Forest Preserve Board agreeing to pay the remaining sixty-five thousand dollars by paying for the dam, which, it will be remembered, was a provision of the original contract of the sixth of August (R. 6, 59, 52, 53).

This was the *first* of October.

On the *seventh* of October the Forest Preserve Board met again, and it having been reported to the Board that Mr. Justice McLaughlin, of the Supreme Court of New York, who had made the injunction, had declined to vacate it, the Forest Preserve Board took the strip of land described in the railway map, by the right of eminent domain, under chapter two hundred and twenty of the laws of eighteen hundred and ninety-seven (R. 48, 51; the law is printed, *post*, p. 31).

This appropriation was made by the service upon Mr. McEchron, the president of the Indian River Company, of the paper, a copy of which is Exhibit 12 (R. 50). This service was made in the presence of the members of the Forest Preserve Board. Mr. Allds testifies that it was made at ten minutes before noon. Mr. Ashley and Mr. McEchron testify that it was made later. Mr. Ashley and Mr. McEchron had before this received their ninety-nine

thousand dollars, and the People of the State of New York were paying for the dam.

On the same day the Adirondack Railway Company began condemnation proceedings in the three counties to take the strip across, or rather twisting around through Township fifteen.

As the decision of the trial judge is in the short form, and the reversal by the Appellate Division was not on the fact, all facts are found in our favor.

Amherst College *vs.* Ritch, 151 N. Y., 282, 320.

The facts then are these:

1. At ten minutes before noon the condemnation proceedings of the People of the State of New York were begun and completed—the title vesting at once.
2. At and after noon, and, of course, after the condemnation proceedings of the People of the State of New York were ended, the three condemnation proceedings of the plaintiff in error were begun, *lis pendens* was filed in all three proceedings, and service of the petitions made.

The injunction having been continued by the Special Term (R. 25), counsel for the State was permitted to take and argue an appeal, although even then, Mr. Ashley stipulated the appeal over the November Term (R. 33, 30).

The appeal resulted in a reversal of the order continuing the injunction (27 App. Div., 326).

(See the opinion of the Appellate Division, speaking by Mr. Justice Herrick, attached to this brief.)

This was the second of March (R. 60).

THIRD HEAD: Facts since the decision of the Appellate Division of the Supreme Court of New York in Adirondack Railway Company *v.* Indian River Company, 27 App. Div. 326.

The original deed in escrow was then delivered and recorded (R. 53).

Meanwhile, the condemnation proceedings stood to be heard at Plattsburgh on the twelfth of March—a fact of which it is quite apparent that nobody on the part of the State knew anything. Mr. Ashley testifies, that since the decision of the Appellate Division he understood that there was nothing further to be done on his part (R. 67).

The way he carried out this understanding that there “was nothing further to be done on his part” was this: He went to Plattsburgh on the twelfth of March; appeared in the proceedings for not only his own clients, but Judge Brown’s, consented to the appointment of a referee, an immediate hearing and an immediate judgment (R. 62, 66, 68), which by the regular process would have taken about a month at least.

Learning of this by accident, the proceedings under the judgment were stopped by the injunction in this action.

FOURTH HEAD: The Adirondack Railway Company.

The Adirondack Company was incorporated 29th October, 1863 (R. 71), under the General Railroad Act of New York (Chapter 140, Laws 1850), and Chapter 236 of the Laws of New York of 1863 (printed *post*, p. 14).

It constructed the railroad at present owned and operated by the plaintiff in error, extending from Saratoga Springs

to North Creek. In an action to foreclose a mortgage which it had made, its railroad was sold, and on the seventh day of July, 1882, the purchasers organized the plaintiff in error with a life of one thousand years (R. 72). This was done under Chapter 469 of the Laws of New York of 1873; Chapter 430 of the Laws of New York of 1874, and Chapter 446 of the Laws of New York of 1876 (printed, *post*, pp. 20-23).

On the ninth of May, 1892, "the Board of Railroad Commissioners of New York," *upon the application of the plaintiff in error*, "issued its certificate certifying "that in its opinion the public interests, under all the cir- "cumstances, did not require the extension of the road of "the Adirondack Railway Company beyond the portion "thereof constructed at the time the said company ac- "quired title to said railroad property and franchises, "namely, beyond North Creek, in the county of Warren" (R. 19; in evidence, R. 72).

This certificate was made under Section 83 of the Railroad Law of New York (R. 19; in evidence, R. 72). That section is printed (*post*, p. 29).

FIFTH HEAD : Decisions below.

The Special Term of the Supreme Court of New York gave judgment for the People, perpetually enjoining the Adirondack Railway Company from taking the land.

The Appellate Division of the Supreme Court of New York reversed this judgment and ordered a new trial upon

the ground that *by the filing of its map on the eighteenth of September the railway company had impressed upon the land a lien, good against the State* (R.76). Upon appeal by the People of the State of New York the Court of Appeals of New York reversed the order of the Appellate Division and affirmed the judgment.

SIXTH HEAD : Laws.

I. THE CONSTITUTION OF THE UNITED STATES—

“ARTICLE I.

“ SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

“ No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

“ No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

“ ARTICLE IV.

“ SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

“ SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

“ A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

“ No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”

Amendments.

“ (ARTICLE V.)

“ No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

“ARTICLE XIV.

“(Proposed by Congress, June 16, 1866; ratification announced by secretary of state, July 25, 1868.)

“SECTION 1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

“§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

II. The CONSTITUTION OF NEW YORK—

Section seven of Article seven is as follows:

“*The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by ANY corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.*”

Italics and capitals are mine; the literal rendering is as follows:

“Sec. 7. The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.”

(First of January, 1895.)

Section ten of Article one is as follows:

“Sec. 10. The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall

"fail, from a defect of heirs, shall revert, or escheat to
"the people." (1846.)

Section twelve of Article one is as follows:

" Sec. 12. All lands within this state are declared to be
" allodial, so that, subject only to the liability to escheat,
" the entire and absolute property is vested in the owners,
" according to the nature of their respective estates."
(1846.)

Section one of Article one is as follows:

" Section 1. No member of this state shall be dis-
" franchised, or deprived of any of the rights or privi-
" leges secured to any citizen thereof, unless by the law of
" the land, or the judgment of his peers." (1777.)

" The words 'by the law of the land,' as here used, do not mean a statute passed
for the purpose of working the wrong." *Taylor v. Porter*, 4 Hill, 140, 145.

Section six of Article one is as follows:

" Sec. 6. No person shall be held to answer for a cap-
" ital or otherwise infamous crime (except in cases of im-
" peachment, and in cases of militia when in actual ser-
" vice, and the land and naval forces in time of war, or
" which this state may keep with a consent of Congress in
" time of peace, and in cases of petit larceny, under the
" regulation of the Legislature), unless on presentment or
" indictment of a grand jury, and in any trial in any court
" whatever the party accused shall be allowed to appear
" and defend in person and with counsel as in civil ac-
" tions. No person shall be subject to be twice put in
" jeopardy for the same offense; nor shall he be com-
" pelled in any criminal case to be a witness against him-
" self; *nor be deprived of life, liberty or property with-*
" *out due process of law; nor shall private property be*
" *taken for public use, without just compensation.*"
(1821.)

Section seven of Article one contains the following:

“ § 7. When private property shall be taken for any public use, the compensation to be made therefore, *when such compensation is not made by the State,* shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.” (1846.)

Italics are mine.

Section eighteen of Article three:

“ Sec. 18. The Legislature shall not pass a private or local bill in any of the following cases:

* * * * *

“ Granting to any corporation, association or individual the right to lay down railroad tracks Granting to any private corporation, association, or individual any exclusive privilege, immunity or franchise whatever.” (1882.)

Section one of Article eight:

“ Section 1. Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.”

Section one of Article eight of the Constitution of 1846 was as follows:

“ SECTION 1. Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the legislature, the object of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section, may be altered from time to time or repealed.”

It has been in force ever since with the change of the “1” in legislature to a capital in 1895.

Section fourteen of Article one:

“ Section 14. All fines, quarter sales or other like restraints upon alienation, reserved in any grant of land hereinafter to be made, shall be void.” (1846.)

III. STATUTES OF NEW YORK.

1. *Relating to the plaintiff in error.*

Revised Statutes (1830), Part 1, Chapter XVIII., Title 3, § 8.

“ § 8. The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature.”

Repealed by Chapter 687, Laws 1892 (the General Corporations Law), Chapter 672, Laws 1895. (“The General Corporations Law” amended.)

“ § 40. ALTERATION AND REPEAL OF CHARTER.—The charter of every corporation shall be subject to alteration, suspension and repeal in the discretion of the legislature.”

Chapter 140, Laws 1850 (the General Railroad Act).

“ § 48. The legislature may at any time annul or dissolve any incorporation formed under this act, but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.”

Repealed by Chapter 687, Laws 1892 (17th June, 1892), “the General Corporations Law,” which contained the following:

“ § 36. CONSTRUCTION.—The provisions of this chapter, and of the stock corporation law, the railroad law, the transportation corporations law, and the business corporations law, so far as they are substantially the same as those of laws existing on April 30, 1891, shall be construed as a continuation of such laws modified or amended according to the language employed in this chapter, or in the stock corporation law, the railroad

“ law, the transportation corporations law, or the business corporations law, and not as new enactments.”

Chap. 236. Laws 1863.

“ An Act to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of the State, and the development of the resources thereof.

“ SECTION 1. Albert L. Cheney may associate with him any number of persons, and make and file articles of association as prescribed by the act entitled ‘ An act to authorize the formation of railroad corporations, and to regulate the same,’ passed April second, eighteen hundred and fifty” (Chapter 140 above mentioned), for the purpose of constructing and operating a railroad from some point in the County of Saratoga up and along the valley of the upper Hudson into the wilderness in the northern part of this State; and when so organized such corporation shall have the rights and privileges given by said act and the acts amending the same, and be subject to the provisions thereof, except so far as the same are inconsistent with the provisions of this act.

“ § 2. The said corporation, when so formed, may purchase, take and hold lands to the amount of one million of acres of lands in said wilderness, in addition to the lands which it shall be authorized to take under the provisions of the said act, passed April second, eighteen hundred and fifty, and the acts amending the same; and all of said lands shall be free and exempt from all taxation until the twelfth day of September, eighteen hundred and eighty-three; but such exemption shall not extend or apply to the roadbed or track of said corporation, nor to lands occupied or used for structures necessary to the working of its road, nor to any lands

“ after the same shall be sold, or contracted to be sold,
“ by said corporation.

“ § 3. The said corporation shall report annually, on the
“ first Monday of January, to the State Engineer and Sur-
“ veyor, the quantity of lands sold by it, with a de-
“ scription thereof and the names of the grantees of said
“ lands.

“ § 4. The said corporation when so formed, shall be
“ authorized during the period of its charter to convert
“ and prepare for market the natural products of the
“ forest, and to mine and prepare for market the iron and
“ other ores and minerals upon its lands, and to transport,
“ sell and dispose of the same.

§ 5. Unless said corporation shall construct and put in
“ operation at least twenty-five miles of its road by the
“ first day of September, eighteen hundred and sixty-four,
“ and thirty-five additional miles of its road by the first
“ day of December, eighteen hundred and sixty-six, and
“ twenty-five additional miles of its road by the first day
“ of December, eighteen hundred and sixty-eight, the said
“ exemptions from taxation shall cease, and said corpor-
“ ation shall not be entitled to said exemptions, unless
“ on or before the first day of January, eighteen hundred
“ and sixty-four, it shall deposit with the Comptroller of
“ this State, in his name of office, a State of New York or
“ United States stock, bearing at least five per cent. in-
“ terest to the amount of twenty thousand dollars at par,
“ to be held as security for the taxes on the lands afore-
“ said, from the year eighteen hundred and sixty-three to
“ eighteen hundred and sixty-eight inclusive, in case said
“ corporation shall not construct and put in operation the
“ portions of its road in this section mentioned, but in
“ case such portions of said road shall be constructed and
“ put in operation as before mentioned, the said stock
“ shall be re-transferred to said company, and the said

“ company until default shall be made in the conditions
“ aforesaid shall be authorized to collect and receive the
“ interest which may from time to time become payable
“ on the said stock so transferred to the said Comptroller
“ as aforesaid, and the said Comptroller shall give to the
“ said company the requisite authority to receive such in-
“ terest. But nothing in this act contained shall be con-
“ strued to make the State liable to pay any county, town,
“ school or highway tax upon any of said lands hereby
“ exempted from taxation.

“ § 6. The evidence of the construction and operation
“ of the railroad mentioned in the fifth section of this act
“ shall be the affidavit of the president, vice-president or
“ chief engineer of said corporation which shall be filed in
“ the office of the State Engineer and Surveyor not more
“ than ten days after the time limited for such construc-
“ tion.

“ § 7. The said corporation shall not be required to
“ finish its road and put it in operation except as men-
“ tioned in the fifth section of this act, before the first
“ day of January, eighteen hundred and seventy.

“ § 8. This act shall take effect immediately.”

“ Chap. 250.” (Laws 1865).

“ AN ACT to authorize the Adirondack Company to ex-
“ tend its railroad to Lake Ontario or River St. Law-
“ rence, and to increase its capital stock.

“ Passed March 31, 1865.”

“ SECTION 1. The Adirondack Company is hereby au-
“ thorized to amend its articles of association so as to en-
“ able it, under the general law, to extend its railroad to
“ some point on Lake Ontario or River St. Lawrence, and
“ to increase its capital stock to such an amount as may be
“ necessary for that purpose, not to exceed five millions of
“ dollars additional capital.

“ § 2. This act shall take effect immediately.”

“Chap. 718.” (Laws 1868).

“AN ACT to amend an act entitled ‘An act to encourage and to facilitate the construction of a railroad along the valley of the Upper Hudson into the wilderness in the northern part of this State, and the development of the resources thereof,’ passed April twenty-seventh, eighteen hundred and sixty-three, and for the relief of the Adirondack Company under said act.

“Passed May 6, 1868, three-fifths being present.”

“SECTION 1. The time allowed the Adirondack Company to construct the thirty-five miles of its road mentioned in section five of chapter two hundred and thirty-six of the laws of eighteen hundred and sixty-three, is extended to the thirty-first day of December, eighteen hundred and seventy, and if said company shall construct one-third of said thirty-five miles of road in each of the years eighteen hundred and sixty-eight, eighteen hundred and sixty-nine and eighteen hundred and seventy, continuous by northward from the present northern extremity of the twenty-five miles of said road already constructed, it shall be relieved from all forfeitures imposed by said act, and shall be entitled to all the rights and privileges, exemptions and franchises granted by said act; but in case said company shall fail to construct and complete by the thirty-first day of December, eighteen hundred and sixty-eight, one-third of said thirty-five miles of its road, northward from its present terminus, this act shall be of no force and effect, anything herein contained to the contrary notwithstanding.

“§ 2. The twenty United States government bonds deposited with the Comptroller of the State, pursuant to section five of said act, shall remain in his hands as security for the taxes upon the lands mentioned in

“ said act for the years eighteen hundred and sixty-three
 “ to eighteen hundred and seventy, inclusive, in case said
 “ corporation shall not complete said thirty-five miles of
 “ its road, as provided by the first section of this act;
 “ but in case said thirty-five miles of road shall be con-
 “ structed, the said bonds shall be transferred to said com-
 “ pany, and until default shall be made in the perfor-
 “ mance of the conditions aforesaid, said company shall be
 “ authorised to collect and receive the interest on said
 “ bonds, and the Comptroller shall give to said company
 “ the requisite authority to receive the said interest.

“ § 3. The said company may construct a branch of its
 “ road from some point on its line between the north line
 “ of the town of Thurman in the County of Warren, and
 “ the southerly line of the County of Essex, and so much
 “ of such branch railroad as shall be constructed by said
 “ company, continuously northward from the main line of
 “ said company's road, shall be deemed a part of the
 “ thirty-five miles of the road required to be built by the
 “ first and second sections of this act, and of the eighty-
 “ five miles of said road required to be built by chapter
 “ two hundred and thirty-six of the laws of eighteen hun-
 “ dred and sixty-three.

“ § 4. This act shall take effect immediately.”

Chapter 850 of the laws of 1868 provided that if the Company should complete the thirty-five miles of road as follows: twelve in 1868, twelve in 1869 and eleven in 1870, “ Then said company shall be entitled to all the rights, “ privileges, exemptions and franchises granted by chap- “ ter two hundred and thirty-six of the laws of eighteen “ hundred and sixty-three.”

“ Chap. 857.” (Laws 1871).

“ AN ACT to amend an act entitled ‘ An act to amend
 “ an act to encourage and facilitate the construction of a

“ railroad along the valley of the upper Hudson into
 “ the wilderness, in the northern part of this State, and
 “ the development of the resources thereof,’ passed April
 “ twenty-seventh, eighteen hundred and sixty-three, and
 “ for the relief of the Adirondack Company formed under
 “ said act, passed May eighth, eighteen hundred and
 “ sixty-eight.

“ Passed April 28, 1871; three-fifths being present.”

“ SECTION 1. Section three of “ An act entitled ‘ An act
 “ to amend an act to encourage and facilitate the con-
 “ struction of a railroad along the valley of the upper
 “ Hudson into the wilderness, in the northern part of
 “ this State, and the development of the resources there-
 “ of, passed April twenty-seventh, eighteen hundred and
 “ sixty-three, and for the relief of the Adirondack Com-
 “ pany formed under said act,’ passed May eighth,
 “ eighteen hundred and sixty-eight, is hereby amended
 “ by striking out the following words, to wit: ‘ and the
 “ southerly line of the County of Essex,’ and inserting in
 “ lieu thereof the following words, to wit: ‘ and the north
 “ line of the town of Newcomb, in the County of Essex.’

“ § 2. This act shall take effect immediately.”

“ Chap. 864.” (Laws 1872).

“ AN ACT to authorise the Adirondack Company to
 “ construct and operate a branch of its railroad from its
 “ main line to the north bounds of the State.

“ Passed May 31, 1872.”

“ SECTION 1. The Adirondack Company is hereby
 “ authorised to construct and operate a branch of its rail-
 “ road, commencing at some point in its line between the
 “ south line of the town of Thurman, in the county of
 “ Warren, and the north line of the town of Newcomb,
 “ in the county of Essex, and running to the north bounds

“ of this State, in either of the towns of Mooers or Champ-
“ lain, in the county of Clinton.

“ § 2. This act will take effect immediately.”

“ Chap. 695.” (Laws 1873).

“ AN ACT authorising the Adirondack Company to build
“ a branch railroad to the village of Caldwell.

“ Passed June 10, 1873.

“ SECTION 1. The Adirondack Company is hereby
“ authorised and empowered to build a branch railroad
“ from their railroad in the town of Hadley to the village
“ of Caldwell at the head of Lake George, and to charge
“ not to exceed one dollar for each passenger carried over
“ such extension.

“ § 2. All the laws applicable to the said Adirondack
“ Company’s railroad are hereby made applicable to said
“ extension.

“ § 3. This act shall take effect immediately.”

“ Chap. 469.” (Laws 1873).

“ An Act relative to the purchasers of the franchises
“ and property of corporations whose franchises and prop-
“ erty shall have been sold by mortgage.

“ Passed May 9, 1873.”

“ SECTION 1. Whenever the franchises, easements,
“ privileges, rights and liberties of any corporation created
“ by any act of the legislature of this State, or formed or
“ incorporated under or by virtue of any general act
“ thereof, and empowered by said act to mortgage its
“ property, or franchises, and the property, estate and
“ effects of any such corporation, have been heretofore,
“ or may be hereafter, sold by virtue of any mortgage exe-
“ cuted by such corporation; and whenever the purchaser
“ or purchasers thereof shall have acquired title to the

" same, in the manner prescribed by law, such purchaser
 " or purchasers may associate with him or them any
 " number of persons, and upon making and filing articles
 " of association as prescribed by this act, such purchaser
 " or purchasers and his or their associates, and their
 " successors and assigns, being residents of this State, shall
 " thereupon become and be a body politic and corporate,
 " and may take and receive a conveyance of and shall
 " thereupon succeed to, possess, and exercise and enjoy
 " all the rights, powers, franchises, privileges, easements,
 " liberties, property, estate and effects of which the title
 " shall have been acquired and conveyed as aforesaid."

" § 4. Said certificate" (to articles of association)
 " shall be executed in duplicate and acknowledged before
 " some officer competent to take acknowledgment of
 " deeds. One of said duplicates shall be filed in the office
 " of the Secretary of State, and the other thereof shall be
 " filed in the office of the clerk of the county in which the
 " said corporation first mentioned in this act had its prin-
 " cipal place of business. And thereupon the said body
 " politic and corporate so formed as aforesaid shall exist
 " for the time, and may and shall possess, exercise and
 " enjoy, all the powers, privileges, rights, liberties, ease-
 " ments and franchises, possessed by the said former cor-
 " poration, and in the same manner, and to the same ex-
 " tent, and with the same force and effect as the same
 " could have been exercised by the same former corpora-
 " tion, had not such sale as aforesaid been made.

Chap. 446 (Laws 1876).

" SECTION 1. The first section of chapter four hundred
 " and thirty of laws of eighteen hundred and seventy-
 " four entitled 'An act to facilitate the reorganization of
 " railroads sold under mortgage, and providing for the

"formation of new companies in such cases' is hereby
"amended so as to read as follows:

"§ 1. In case the railroad and property connected
"therewith, and the rights, privileges and franchises of
"any corporation, except a street railroad company, cre-
"ated under the general railroad law of this State, or
"existing under any special or general act or acts of the
"Legislature thereof, shall be sold under or pursuant to
"the judgment or decree of any court of competent juris-
"diction made or given to execute the provisions or en-
"force the lien of any deed or deeds of trust, or mortgage
"theretofore executed by any such company, the pur-
"chasers of such railroad property and franchises, and
"such persons as they may associate with themselves,
"their grantees or assignees or a majority of them, may be-
"come a body politic and corporate, and as such may
"take, hold and possess the title and property included in
"said sale, and shall have all the franchises, rights, pow-
"ers, privileges and immunities which were possessed be-
"fore such sale by the corporation whose property shall
"have been sold as aforesaid, by and upon filing in
"the office of the Secretary of State a certifi-
"cate * * * *

"And upon the due execution of such certificate, and
"the filing of the same in the office of the Secretary of
"State, the persons executing such certificate, and who
"shall have acquired the title to the property and fran-
"chises sold as aforesaid their associates, successors and
"assigns, shall become and be a body politic and corpor-
"ate, by the name specified in such certificate, and be-
"come and be vested with, and entitled to exercise and
"enjoy, all the rights, privileges and franchises, which at
"the time of such sale belonged to, or were vested in the
"corporation, which last owned the property so sold, or
"its receiver, and shall be subject to all the provisions,

“duties and liabilities imposed by the act entitled ‘An act to authorize the formation of railroad corporations and to regulate the same,’ passed April second, eighteen hundred and fifty, and of the acts amendatory thereof, except so far as said provisions, duties and liabilities may be inconsistent herewith, and with the last named rights, privileges or franchises;” * * * * “Said articles shall not be inconsistent with the Constitution or laws of this State, and shall be binding upon the company until changed as therein provided for, or until otherwise provided by law.”

“*The Railroad Law.*

“Chapter 565, Laws 1890.

“AN ACT in relation to railroads constituting chapter thirty-nine of the general laws.

“(Became a law June 7, 1890, taking effect May 1, 1891.)

“Section 1, SHORT TITLE.—This chapter shall be known as the railroad law.

“§ 2. INCORPORATION.—Fifteen or more persons may become a corporation, for the purpose of building, maintaining and operating a railroad, or of maintaining and operating a railroad already built, not owned by a railroad corporation, or for both purposes, by executing, acknowledging and filing a certificate, in which shall be stated :

- “1. The name of the corporation.
- “2. The number of years it is to continue.
- “3. The kind of road to be built or operated.
- “4. Its length and termini.
- “5. The name of each county in which any part of it is to be located.

“ § 4. ADDITIONAL POWERS CONFERRED.—Subject to the
“ limitations and requirements of this chapter, every rail-
“ road corporation, in addition to the powers given by the
“ general and stock corporation laws, shall have power:

“ 1. ENTRY UPON LANDS FOR PURPOSES OF SURVEY.—
“ To cause the necessary examination and survey for its
“ proposed railroad to be made for the selection of the
“ most advantageous route; and for such purpose, by its
“ officers, agents or servants, to enter upon any lands or
“ waters, subject to liability to the owner for all damages
“ done.

“ 2. ACQUISITION OF REAL ESTATE.—To take and hold
“ such voluntary grants of real estate and other property
“ as shall be made to it to aid in the construction, mainte-
“ nance and accommodation of its railroad; and to acquire
“ by condemnation such real estate and property as may
“ be necessary for such construction, maintenance and
“ accommodation in the manner provided by law, but the
“ real property acquired by condemnation shall be held
“ and used only for the purposes of the corporation during
“ the continuance of the corporate existence.”

“ § 5. WHEN CORPORATE POWERS TO CEASE.—If any
“ domestic railroad corporation shall not, within five years
“ after its certificate of incorporation is filed, begin the
“ construction of its road and expend thereon ten per
“ cent(um) of the amount of its capital, or shall not finish
“ its road and put it in operation in ten years from the
“ time of filing such certificate, its corporate existence and
“ powers shall cease. (But if any such steam railroad cor-
“ poration whose certificate of incorporation was filed since
“ the year eighteen hundred and eighty, and whose road
“ as designated in such certificate is wholly within one
“ county and not more than ten miles in length, has
“ acquired the real property necessary for its roadbed by

"purchase, its corporate existence and powers shall not
"be deemed to have ceased because of its failure to com-
"ply with the provisions of this article; and the time for
"beginning the construction of its road and expending
"thereon ten per centum of its capital is extended until
"thirteen years from the date of the filing of such certifi-
"cate, and the time for finishing its road and putting it in
"operation is extended until eighteen years from the date
"of such filing.")

The words and letters enclosed in brackets added by chapter 433 of the laws of 1893.

"§ 6.—LOCATION OF ROUTE.—Every railroad corpora-
"tion except a street surface railroad corporation and an
"elevated railway corporation, before constructing any
"part of its road in any county named in its certificate of
"incorporation, or instituting any proceedings for the
"condemnation of real property therein, shall make a
"map and profile of the route adopted by it in such
"county, certified by the president and engineer of the
"corporation, or a majority of the directors, and file it in
"the office of the clerk of the county in which the road is
"to be made. The corporation shall give written notice
"to all actual occupants of the lands over which the route
"of the road is so designated, and which has not been
"purchased by or given to it, of the time and place such
"map and profile were filed, and that such route passes
"over the lands of such occupants. Any such occupant
"or the owner of the land aggrieved by the proposed loca-
"tion may, within fifteen days after receiving such notice,
"give ten days' written notice to such corporation and to
"the owners or occupants of lands to be affected by any
"proposed alteration, of the time and place of an applica-
"tion to a justice of the supreme court, in the judicial
"district where the lands are situated, by petition duly
"verified, for the appointment of commissioners to exam-
"ine the route. The petition shall state the objections to

" the route designated, shall designate the route to which
" it is proposed to alter the same, and shall be accompa-
" nied with a survey, map and profile of the route desig-
" nated by the corporation, and of the proposed alteration
" thereof, and copies thereof shall be served upon the cor-
" poration and such owners or occupants with the notice
" of the application. The justice may, upon the hearing
" of the application, appoint three disinterested persons,
" one of whom must be a practical civil engineer, commis-
" sioners to examine the route proposed by the corpora-
" tion, and the route to which it is proposed to alter the
" same, and after hearing the parties, to affirm the route
" originally designated, or adopt the proposed alteration
" thereof, as may be consistent with the just rights of all
" parties and the public, including the owners or occu-
" pants of lands upon the proposed alteration; but
" no alteration of the route shall be made except by
" the concurrence of the commissioner, who is a prac-
" tical civil engineer, nor which will cause greater damage
" or injury to lands or materially greater length of road
" than the route designated by the corporation, nor which
" shall substantially change the general line adopted by
" the corporation. The commissioners shall, within thirty
" days after their appointment, make and certify their
" written determination, which with the petition, map,
" survey and profile, and any testimony taken before
" them, shall be immediately filed in the office of the
" county clerk of the county; within twenty days after
" such filing, any party may, by written notice to the
" other, appeal to the general term of the supreme court
" from the decision of the commissioners, which appeal
" shall be heard and decided at the next term held in the
" department in which the lands of the petitioners or any
" of them are situated, for which the same can be noticed,
" according to the rules and practice of the court. On the

“ hearing of such appeal, the court may affirm the route
“ proposed by the corporation or may adopt that proposed
“ by the petitioner. The commissioners shall each be en-
“ titled to six dollars per day for their services, and to
“ their reasonable and necessary expenses, to be paid by
“ the person who applied for their appointment; if the
“ route of the road, as designated by the corporation, is
“ altered by the commissioners, or by the order of the
“ court, the corporation shall refund to the petitioner the
“ amount so paid, unless the decision of the commissioners
“ is reversed upon appeal taken by the corporation. No
“ such corporation shall institute any proceedings for the
“ condemnation of real property in any county until after
“ the expiration of fifteen days from the service by it of
“ the notice required by this section. Every such cor-
“ poration shall transmit to the board of railroad commis-
“ sioners the following maps, profiles and drawings ex-
“ hibiting the characteristics of their road, to wit:

“ A map or maps showing the length and direction of
“ each straight line; the length and radius of each curve;
“ the point of crossing of each town and county line, and
“ the length of line of each town and county accurately
“ determined by measurements to be taken after the com-
“ pletion of the road.

“ Whenever any part of the road completed and used,
“ such maps and profiles of such completed part shall be
“ filed with such board within three months after the
“ completion of any such portion and the commencement
“ of its operation; and when any additional portion of the
“ road shall be completed and used, other maps shall be
“ filed within the same period of time, showing the addi-
“ tional parts so completed. If the route, as located,
“ upon the map and profile filed in the office of any county
“ clerk, shall have been changed, it shall also cause a
“ copy of the map and profile filed in the office of the rail-

“ road commissioners, so far as it may relate to the location in such county, to be filed in the office of the county clerk.”

“ **§ 7. ACQUISITION OF TITLE TO REAL PROPERTY.**—“ All real property, required by any railroad corporation for the purpose of its incorporation, shall be deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real property, or of any right, interest or easement herein, required for such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, it shall have the right to acquire title thereto by condemnation. It shall also have such right in the following cases: * * * *

“ Waters commonly used for domestic, agricultural or manufacturing purposes, shall not be taken by condemnation to such an extent as to injuriously interfere with such use in future. No railroad corporation shall have the right to acquire by condemnation any right or easement in or to any real property owned or occupied by any other railroad corporation, except the right to intersect or cross the tracks and lands owned or held for right of way by such other corporation, without appropriating or affecting any lands owned or held for depots or gravel beds.

Sections 6 and 7 as amended by Chapter 678 of the Laws of 1892.

“ **§ 8. RAILROADS THROUGH PUBLIC LANDS.**—The commissioners of the land office may grant to any domestic railroad corporation any land belonging to the people of the state, except the reservation at Niagara and the Concourse lands on Coney Island, which may be required for the purposes of its road on such terms as may be agreed on by them; or such corporation may

“ acquire title thereto by condemnation; and the county
“ or town officers having charge of any land belonging to
“ any county or town, required for such corporation for
“ the purpose of its road, may grant such land to the
“ corporation for such compensation as may be agreed
“ on.”

“ **§ 83. LIABILITIES OF REORGANIZED RAILROAD CORPORATIONS.**—A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the state shall certify that in their opinion the public interests under all the circumstances do not require such extension. If such board shall so certify and shall file in their office such certificate, which certificate shall be irreversible by such board, such corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension, or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which has been constructed or operated or apply to Kings County.”

Section 3359 of the Code of Civil Procedure is as follows:

“ **§ 3359.** Whenever any person is authorized to acquire title to real property, for a public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title.”

Section 3360 begins as follows:

“ § 3360. The proceeding shall be instituted *by the presentation of a petition* by the plaintiff to the supreme court setting forth the following facts: ”

Section 3371 contains the following:

“ If the report ” (of the commissioners) “ is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. “ Deposit of the money to the credit of, or payable to the order of, the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.”

§ 3381 is as follows:

“ § 3381. Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk’s office of each county where any part of the property is situated, a notice of the pendency of the proceeding, stating the names of the parties and the object of the proceeding, and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book

“ in his office kept for the purpose of recording notices of
 “ pendency of actions, and index it to the name of each
 “ defendant specified in the direction appended at the
 “ foot of the notice, and subscribed by the plaintiff or
 “ his attorney.”

2. *The act under which the forest preserve board took the land.*

Chap. 220, Laws 1897.

“ **AN ACT** to provide for the acquisition of land in the
 “ territory embraced in the Adirondack park and
 “ making an appropriation therefor.

“ Became a law April 8, 1897, with the approval of the
 “ the Governor.

“ Passed, three-fifths being present.

“ *The people of the State of New York, represented
 “ in Senate and Assembly, do enact as follows:*

“ Section 1. The governor, within twenty days after
 “ this act takes effect, shall appoint from the commis-
 “ sioners of fisheries, game and forest and the commission-
 “ ers of the land office, by and with the advice and con-
 “ sent of the senate, three persons to constitute a board to
 “ be known as the ‘forest preserve board.’ The members
 “ of such board may be removed by the governor at his
 “ pleasure. Vacancies shall be filled in like manner as an
 “ original appointment. The members of the board shall
 “ not receive any compensation for their services under
 “ this act, but shall receive their actual and necessary ex-
 “ penses to be audited by the comptroller. The board
 “ may employ such clerical and other assistants as it may
 “ deem necessary. The forest preserve board annually in
 “ the month of January shall make a written report to
 “ the governor showing in detail all its transactions under
 “ this act during the preceding calendar year.

“ § 2. It shall be the duty of the forest preserve board
 “ and it is hereby authorized to acquire for the state, by

" purchase or otherwise, land, structures or waters or
" such portion thereof in the territory embraced in the
" Adirondack park, as defined and limited by the fish-
" eries, game and forest law, as it may deem advisable for
" the interests of the state.

" § 3. The forest preserve board may enter on, and take
" possession of any land, structures and waters in the
" territory embraced in the Adirondack park, the appro-
" priation of which in its judgment shall be necessary for
" the purposes specified in section two hundred and
" ninety of the fisheries, game and forest law, and in sec-
" tion seven of article seven of the constitution.

" § 4. Upon the request of the forest preserve board an
" accurate description of such lands so to be appropri-
" ated shall be made by the state engineer and surveyor,
" or the superintendent of the state land survey, and cer-
" tified by him to be correct, and such board or a majority
" thereof shall indorse on such description a certificate
" stating that the lands described therein have been ap-
" propriated by the state for the purpose of making them
" a part of the Adirondack park; and such description
" and certificate shall be filed in the office of the secre-
" tary of state. The forest preserve board shall there-
" upon serve on the owner of any real property so ap-
" propriated a notice of the filing and the date of filing of
" such description and containing a general description
" of the real property belonging to such owner which has
" been so appropriated; and from the time of such
" service, the entry upon and appropriation by the state
" of the real property described in such notice for the
" uses and purposes above specified shall be deemed com-
" plete, and thereupon such property shall be deemed and
" be the property of the state. Such notice shall be con-
" clusive evidence of an entry and appropriation by the
" state. The forest preserve board may cause duplicates

" of such notice with an affidavit of due service thereof
" on such owner to be recorded in the books used for
" recording deeds in the office of the clerk of any county
" of this state where any of the property described therein
" may be situated, and the record of such notice and of
" such proof of service shall be evidence of the due service
" thereof."

" § 5. Claims for the value of the property taken and
" for damages caused by any such appropriation may be
" adjusted by the forest preserve board if the amount
" thereof can be agreed upon with the owners of the land
" appropriated. The board may enter into an agreement
" with the owner of any land so taken and appropriated,
" for the value thereof, and for any damages resulting
" from such appropriation. Upon making such agree-
" ment the board shall deliver to the owner a certificate
" stating the amount due to him on account of such ap-
" propriation of his lands, and a duplicate of such certifi-
" cate shall also be delivered to the comptroller. The
" amount so fixed shall be paid by the treasurer upon
" the warrant of the comptroller.

" § 6. If the forest preserve board is unable to agree with
" the owner for the value of property so taken or appro-
" priated, or on the amount of damages resulting there-
" from, such owner, within two years after the service
" upon him of the notice of appropriation as above specified,
" may present to the court of claims a claim for the value
" of such land and for such damages, and the court of
" claims shall have jurisdiction to hear and determine such
" claim and render judgment thereon. Upon filing in the
" office of the comptroller a certified copy of the final judg-
" ment of the court of claims, and a certificate of the
" attorney-general that no appeal from such judgment has
" been or will be taken by the state, or, if an appeal has
" been taken a certified copy of the final judgment of the

" appellate court, affirming in whole or in part the judgment of the court of claims, the comptroller shall issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount shall be paid by the treasurer.

" § 7. The owner of land to be taken under this act may, at his option, within the limitations hereinafter prescribed, reserve the spruce timber thereon ten inches or more in diameter at a height of three feet above the ground. Such option must be exercised within six months after a service upon him of a notice of the appropriation of such land by the forest preserve board, by serving upon such board a written notice that he elects to reserve the spruce timber thereon. If such a notice be not served by the owner within the time above specified, he shall be deemed to have waived his right to such reservation, and such timber shall thereupon become and be the property of the State. In case land is acquired by purchase, the spruce timber and no other may be reserved by agreement between the board and the owner, subject to all the provisions of this act in relation to timber reserved after an appropriation of land by the forest preserve board. The presentation of a claim to the court of claims before the service of a notice of reservation, shall be deemed a waiver of the right to such reservation.

" § 8. The reservation of timber and the manner of exercising and consummating such right are subject to the following restrictions, limitations and conditions:

" 1. The reservation does not include or affect timber within twenty rods of a lake, pond or river, and such timber cannot be reserved. Roads may be cut or built across or through such reserved space of twenty rods, under

" the supervision of the forest preserve board, for the purpose of removing spruce timber from adjoining land, and the reservation of spruce timber within such space shall be deemed a reservation by the owner, his assignee or representative, of the right to cut other timber necessary in constructing such road, but such reservation does not confer a right to remove such other timber so cut, or to use it otherwise than in constructing a road.

" 2. The timber reserved must be removed from the land within fifteen years after the service of notice of reservation, or the making of an agreement subject to regulations to be prescribed by the forest preserve board; but such land shall not be cut over more than once, and the said board may prescribe regulations for the purpose of enforcing this limitation. All timber reserved and not removed from the land within such time shall thereupon become and be the property of the state, and all the claim or title thereto by the original owner, his assigns or representatives, shall thereupon be deemed abandoned."

" § 9. A person who reserves timber as herein provided, is not entitled to any compensation for the value of his land purchased or taken and appropriated by the state, nor for any damages caused thereby, until:

" 1. The timber so reserved is all removed and the object of the reservation fully consummated; or

" 2. The time limited for the removal of such timber has fully elapsed, or the right to remove any more timber is waived by a written instrument filed with the forest preserve board; and

" 3. The forest preserve board is satisfied that no trespass on state lands has been committed by such owner or his assigns or representatives; that no timber or other property of the state not so reserved has been taken, removed, destroyed or injured by him or them,

" and that a cause of action in behalf of the state does
" not exist against him or them for any alleged trespass
" or other injury to the property or interests of the state;
" and

" 4. That the owner, his assignee, or other representative has fully complied with all rules, regulations and requirements of the forest preserve board concerning the use of streams or other property of the State for the purpose of removing such lumber.

" § 10. A warrant shall not be drawn by the comptroller for the amount of compensation agreed upon between the owner and the forest preserve board, nor for the amount of a judgment rendered by the court of claims, until a further certificate by the board is filed with him to the effect that the owner has not reserved any timber or that he, his assignee, or other representative, has complied with the provisions of this act, or has otherwise become entitled to receive the amount of the purchase price, award or judgment.

" § 11. The forest preserve board may settle and adjust any claims for damages due to the state on account of any trespasses or other injuries to the property or interests of the state, or penalties incurred by reason of such trespasses or otherwise, and the amount of such damages or penalties so adjusted shall be deducted from the original compensation agreed to be paid for the lands, or for damages, or from a judgment rendered by the court of claims on account of the appropriation of such land. A judgment recovered by the state for such a trespass or for a penalty shall likewise be deducted from the amount of such compensation or judgment.

" § 12. If timber is reserved upon land purchased or appropriated as provided by this act, interest is not payable upon the purchase price or the compensation which may be awarded for the value of such land or for

" damages caused by such appropriation, except as provided in section six.

" § 13. Persons entitled to cut and remove timber under this act may use streams or other waters belonging to the state within the forest preserve for the purpose of removing such timber, under such regulations and conditions as may be prescribed or imposed by the forest preserve board. The persons using such waters shall be liable for all damages caused by such use.

" § 14. If timber be reserved, its value at the time of making an agreement between the owner and the forest preserve board for the value of the land so appropriated and the damages caused thereby, or at the time of the presentation to the court of claims of a claim for such value and damages, shall be taken into consideration in determining the compensation to be awarded to the owner on account of such appropriation either by such agreement or by the judgment rendered upon such claim.

" § 15. The forest preserve board may appoint inspectors to examine the lands upon which timber is reserved and ascertain and report to the board, from time to time, or whenever required, whether such timber is being removed in accordance with the provisions of this act, whether any trespasses or other violations of this act are being committed, and whether the persons entitled to the use of such waters for the purpose of removing timber have complied with the regulations and conditions relating thereto, prescribed or imposed by the board.

" § 16. The forest preserve board shall fix the compensation of all clerks, inspectors or other assistants employed by it, which compensation shall be paid by the treasurer, upon the certificate of the board and the audit and warrant of the comptroller. A person so

" appointed may be removed at the pleasure of the board.

" § 17. The forest preserve board shall take such measures as may be necessary or proper to perfect the title " to any lands in the forest preserve now held by the state, " and for that purpose may pay and discharge any valid " lien or incumbrance upon such land, or may acquire " any outstanding or apparent right, title, claim or interest which, in its judgment, constitutes a cloud on such " title. The amounts necessary for the purposes of this " section shall be paid by the treasurer upon the certificate of the board and the audit and warrant of the " comptroller.

" § 18. If an offer is made by the forest preserve board " for the value of land appropriated, or for damages " caused by such appropriation, and such offer is not " accepted, and the recovery in the court of claims exceeds " the offer, the claimant is entitled to costs and disbursements as in an action in the supreme court, which shall " be allowed and taxed by the court of claims and included in its judgment. If in such a case the recovery " in the court of claims does not exceed the offer, costs " and disbursements to be taxed shall be awarded in favor " of the state against the claimant and deducted from the " amount awarded to him, or if no amount is awarded " judgment shall be entered in favor of the state against " the claimant for such costs and disbursements. If an " offer is not accepted it cannot be given in evidence on " the trial.

" § 19. When a judgment for damages is rendered for " the appropriation of any lands or waters for the purposes " specified in this act, and it appears that there is any lien " or incumbrance upon the property so appropriated, the " amount of such lien shall be stated in the judgment, and " the comptroller may deposit the amount awarded to " the claimant in any bank in which monies belonging to

" the state may be deposited, to the account of such judgment, to be paid and distributed to the persons entitled " to the same as directed by the judgment."

" § 20. If a person cuts down or carries off any wood, " bark, underwood, trees or timber, or any part thereof, " or girdles or otherwise despoils a tree in the forest preserve, without the permission of the forest preserve board, an action may be maintained against him by the board in its name of office and in such an action the board may recover treble damages if demanded in the complaint. Every such person also forfeits to the state the sum of twenty-five dollars for every tree cut down or carried away by him or under his direction, to be recovered in a like action by the forest preserve board. All sums recovered in any such action shall be paid by the board to the state treasurer, and credited to the general fund.

" § 21. Service of a notice by the forest preserve board under section four must be personal if the person to be served can be found in the state. The provisions of the code of civil procedure relating to the service of a summons in an action in the supreme court, except as to publication, apply, so far as practicable, to the service of such a notice. If a person to be served cannot with due diligence be found in the state, a justice of the supreme court may, by order, direct the manner of such service, and service shall be made accordingly.

" § 22. The court of claims, if requested by the claimant or the attorney-general, shall examine the real property affected by the claim and take the testimony in relation thereto in the county where such property or a part thereof is situated. The actual and necessary expenses of each judge and of each officer of the court in making such examination and in so taking testimony

" shall be audited by the comptroller and paid from the
" money appropriated for the purposes of this act.

" § 23. The power to appropriate real property, vested
" in the forest preserve board by section four, is subject
" to the following limitations: Such real property must
" adjoin land already owned or appropriated by the state
" at the time the description and certificate are filed in the
" office of the secretary of state, except that timber land
" not so adjoining state land may be appropriated when-
" ever in the judgment of the board timber thereon
" other than spruce, pine or hemlock is being cut or re-
" moved to the detriment of the forest, or the interests of
" the state.

" § 24. The sum of six hundred thousand dollars, or so
" much thereof as may be necessary, is hereby appropri-
" ated for the purposes specified in this act, out of any
" monies in the treasury not otherwise appropriated. In
" addition to the amount above appropriated, the comp-
" troller, upon the written request of the forest preserve
" board, is hereby authorized and directed to borrow,
" from time to time, not exceeding in the aggregate
" the sum of four hundred thousand dollars for the
" purposes specified in this act, and to issue bonds or cer-
" tificates therefor payable within ten years from their
" date, bearing interest at a rate not exceeding five per
" centum per annum, and which shall not be sold at less
" than par. The sums so borrowed are hereby appropri-
" ated, payable out of the moneys realized from the sale
" of such bonds or certificates, to be expended under the
" direction of the forest preserve board for the purposes of
" this act, and to be paid by the treasurer on the war-
" rant of the comptroller.

" § 25. All acts and parts of acts inconsistent with this
" act are hereby repealed.

" § 26. This act shall take effect immediately."

3. Other acts relating to the forest preserve and the Adirondack park :

“ Chap. 283 ” (Laws 1885.)

“ Passed May 15, 1885 ; three-fifths being present.”

“ AN ACT to establish a forest commission, and to define its powers and duties and for the preservation of forests.”

“ SECTION 1. There shall be a forest commission which shall consist of three persons who shall be styled forest commissioners, and who may be removed by the governor for cause. The forest commissioners shall be appointed by the governor by and with the advice and consent of the senate.

“ § 2. At the first meeting of the forest commissioners they shall divide themselves by lot, so that the term of one shall expire in two years, one in four years, and one in six years from the first day of February next ensuing. Except as to the three terms of office thus determined, the term of office of a forest commissioner shall be six years from the first day of February on which the preceding term expires.

“ § 3. During the month of January, in the year eighteen hundred and eighty-eight, and in every second year thereafter, the governor by and with the advice and consent of the senate, shall appoint one forest commissioner. Vacancies that may exist in the office of a forest commissioner after the commencement of a term of office shall be filled by the governor's appointment subject to the confirmation of the senate at its next session for the unexpired portion of the term in which the vacancy occurs.

“ § 4. The forest commissioners shall serve without compensation except that there shall be paid them their reasonable expenses incurred in the performance of their official duties.

“ § 5. The forest commission shall have power to employ a forest warden, forest inspectors, a clerk and all such agents, as they may deem necessary, and to fix their compensations, but the expenses and salaries of such warden, agents, clerk, inspectors and assistants shall not exceed in the aggregate with the other expenses of the commission the sum therefor appropriated by the legislature.

“ § 6. The trustees of public buildings, under chapter three hundred and forty-nine, laws of eighteen hundred and eighty-three, shall provide rooms for office for the forest commission, with proper furniture and fixtures, and with warming and lights.

“ § 7. All the lands now owned or which may hereafter be acquired by the state of New York, within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, shall constitute and be known as the forest preserve.

“ § 8. The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private.

“ § 9. The forest commission shall have the care, custody, control and superintendence of the forest preserve. It shall be the duty of the commission to maintain and protect the forests now on the forest preserve, and to promote as far as practicable the further growth of forests thereon. It shall also have charge of the public interests of the state, with regard to forests and tree planting, and especially with reference to forest fires in every part of the state. It shall have as to all lands now or hereafter included in the forest preserve, but

“ subject to the provisions of this act, all the powers now
“ vested in the commissioners of the land office and in
“ the comptroller as to such of the said lands as are now
“ owned by the state. The forest commission may, from
“ time to time, prescribe rules or regulations and may,
“ from time to time, alter or amend the same, affecting
“ the whole or any part of the forest preserve, and for
“ its use, care and administration; but neither such rules
“ or regulations, nor anything herein contained shall pre-
“ vent or operate to prevent the free use of any road,
“ stream or water as the same may have been heretofore
“ used or as may be reasonably required in the prosecu-
“ tion of any lawful business.

“ § 10. The forest warden, forest inspectors, foresters
“ and other persons acting upon the forest preserve under
“ the written employment of the forest warden or of the
“ forest commission may, without warrant, arrest any per-
“ son found upon the forest preserve violating any of the
“ provisions of this act; but in case of such arrest, the
“ person making the arrest shall forthwith take the person
“ arrested before the nearest magistrate having jurisdiction
“ to issue warrants in such case, and there make, or pro-
“ cure to be made, a complaint in writing, upon which
“ complaint the magistrate shall act as the case may
“ require.”

“ § 11. The forest commission may bring in the name, or
“ on behalf of the people of the state of New York, any
“ action to prevent injury to the forest preserve or trespass
“ thereon, to recover damages for such injury or trespass,
“ to recover lands properly forming part of the forest pre-
“ serve, but occupied or held by persons not entitled
“ thereto, and in all other respects for the protection and
“ maintenance of the forest preserve, which any owner of
“ lands would be entitled to bring. The forest commission
“ may also maintain, in the name or on behalf of the people

"of the state, an action for the trespass specified in
"section seventy-four, article fifth, title five, chapter
"nine, part one of the Revised Statutes, when such tres-
"pass is committed upon any lands within the forest pre-
"serve. In such action there shall be recoverable the
"same penalty, and a like execution shall issue, and the
"defendant be imprisoned thereunder without being en-
"titled to the liberties of the jail, all as provided in sections
"seventy-four and seventy-six of the said article; and in
"such action the plaintiff shall be entitled to an order of
"arrest before judgment as in the cases mentioned in sec-
"tion five hundred and forty-nine of the Code of Civil
"Procedure. The trespass herein mentioned shall be
"deemed to include, in addition to the acts herein speci-
"fied in the said section seventy-four, any act of cutting
"or causing to be cut, or assisting to cut, any tree or
"timber standing within the forest preserve, or any bark,
"thereon, with intent to remove such tree or timber, or
"any portion thereof, or bark therefrom, from the said
"forest preserve. With the consent of the attorney-
"general and the comptroller, the forest commission may
"employ attorneys and counsel to prosecute any such ac-
"tion, or to defend any action brought against the com-
"mission or any of its members or subordinates arising out
"of their or his official conduct with relation to the forest
"preserve. Any attorney or counsel so employed shall
"act under the direction and in the name of the attorney-
"general. Where such attorney or counsel is not so
"employed, the attorney-general shall prosecute and de-
"fend such actions.

"§ 12. In an action brought by or at the instance of
"the forest commission, an injunction, either prelim-
"inary or final, shall upon application be granted restrain-
"ing any act of trespass, waste or destruction upon the
"forest preserve.

“ § 13. Whenever the state owns or shall own
“ an undivided interest with any person in any lands
“ within the counties mentioned in section eight of this
“ act, or is or shall be in possession of any such lands as
“ joint tenants or tenants in common with any person who
“ has an estate of freehold therein, the attorney-general
“ shall, upon the request of the forest commission, bring
“ an action in the name of the people of the state of New
“ York, for the actual partition of the said lands according
“ to the respective rights of the parties interested therein ;
“ and upon the consent in writing of the forest commission
“ any such person may maintain an action for the actual
“ partition of such lands, according to the respective
“ rights of the parties interested therein, in the same
“ manner as if the state were not entitled to exemption
“ from legal proceedings, service of process in such
“ action upon the attorney-general to be deemed service
“ upon the state. Such actions, the proceedings and the
“ judgment therein, and the proceedings under the judg-
“ ment therein shall be according to the practice at the
“ time prevailing in actions of partition and shall have
“ the same force and effect as in other actions, except that
“ no costs shall be allowed to the plaintiff in such actions,
“ and except that no sale of lands shall be adjudged
“ therein. The forest commission may, without suit, but
“ upon consent of the comptroller, agree with any person
“ or persons owning lands within the said towns jointly or
“ as tenants in common with the state for the partition of
“ such lands, and upon such agreement and consent, the
“ comptroller shall make on behalf of the people of the
“ state any conveyance necessary or proper in such par-
“ tition, such conveyance to be forthwith recorded as now
“ provided by law as to conveyances made by the commis-
“ sioners of the land office.

“ § 14. All income that may hereafter be derived from

" state forest lands shall be paid over by the forest commission to the treasury of the state.

" § 15. A strict account shall be kept of all receipts and expenses, which account shall be audited by the commissioner, and a general summary thereof shall be reported annually to the legislature.

" § 16. The forest commission shall, in January of every year, make a written report to the legislature of their proceedings, together with such recommendations of further legislative or official action as they may deem proper.

" § 17. The supervisor of every town in the state in which wild or forest lands belonging to the state are located, except within the counties mentioned in section seven of this act, shall be by virtue of his office the protector of these lands, subject to the instructions he may receive from the forest commission. It shall be his duty to report to the district-attorney for prosecution any acts of spoilation or injury that may be done, and it shall be the duty of such district-attorney to institute proceedings for the prevention of further trespass, and for the recovery of all damages that may have been committed, with costs of prosecution. The supervisors shall also report their proceedings therein to the forest commission. In towns where the forest commission shall deem it necessary, they may serve a notice upon the supervisor, requiring him to appoint one or more forest guards, and if more than one in a town, the district of each shall be properly defined. The guard so appointed shall have such powers, and perform such duties and receive such pay as the forest commission may determine.

" § 18. The forest commission shall take such measures as the department of public instruction, the regents of the university and the forest commission may approve,

" for awakening an interest in behalf of forestry in the
" public schools, academies and colleges of the state, and
" of imparting some degree of elementary instruction
" upon this subject therein.

" Section 19. The forest commision shall, as soon as
" practicable, prepare tracts or circulars of information
" giving plain and concise advice for the care of woodlands
" upon private lands, and for the starting of new planta-
" tions upon lands that have been denuded, exhausted by
" cultivation, eroded by torrents, or injured by fire, or
" that are sandy, marshy, broken, sterile or waste, and
" unfit for other use. These publications shall be fur-
" nished without cost to any citizen of the State, upon
" application, and proper measures may be taken for
" bringing them to the notice of persons who would be
" benefitted by this advice.

" Section 20. Every supervisor of a town in this State,
" excepting within the counties mentioned in section seven
" of this act, shall be *ex-officio* fire warden therein. But
" in towns particularly exposed to damages from forest
" fires, the supervisor may divide the same into two or
" more districts, bounded as far as may be by roads,
" streams of water, or dividing ridges of land or lot lines,
" and he may, in writing, appoint one resident citizen in
" each district as district fire warden therein. A descrip-
" tion of these districts and the names of the district fire
" wardens thus appointed shall be recorded in the office
" of town clerk. The supervisor may also cause a map of
" the fire district of his town to be posted in some public
" place with the names of the district fire wardens ap-
" pointed. The cost of each map, not exceeding five dol-
" lars, may be made town charge; and the services of the
" fire wardens shall also be deemed a town charge and
" shall not exceed the sum of two dollars per day for the
" time actually employed. Within the counties men-

tioned in section seven of this act, such persons shall be fire wardens as may from time to time be appointed by the forest commission. The persons so appointed shall act during the pleasure of the forest commission; and there shall be applicable to them all the provisions of this act, with reference to supervisors and district town wardens. Upon the discovery of a forest fire, it shall be the duty of the fire warden of the district, town or county, to take such measures as may be necessary for its extinction. For this purpose he shall have authority to call upon any person in the territory in which he acts for assistance, and any person shall be liable to a fine of not less than five nor more than twenty dollars for refusing to act when so called upon.

Section 21. The forest commission, the forest warden, the forest inspector, the foresters, and any other persons employed by or under the authority of the forest commission, and who may be authorized by the commission to assume such duty, shall within the counties mentioned in section seven of this act, whenever the woods in any such town shall be on fire, perform the duties imposed upon, and in such case shall have the powers granted to the justices of the peace, the supervisors and the commissioner of highways of such town by title fourteen of chapter twenty of part one of the Revised Statutes, with reference to the ordering of persons to assist in extinguishing fires or stopping their progress; and any person so ordered by the forest commission, the forest warden, the forest inspectors, the foresters, or any of them, or any other person acting or authorized as aforesaid who shall refuse or neglect to comply with any such order shall be liable to the punishment prescribed by the said title.

Section 22. No action for trespass shall be brought by any owner of land for entry made upon his premises

“ by persons going to assist in extinguishing a forest fire,
“ although it may not be upon his land.

“ Section 23. The fire wardens, or the supervisor,
“ where acting in general charge, may cause fences to be
“ destroyed or furrows to be ploughed to check the running
“ of fires, and in cases of great danger, back-fires may be
“ set along a road or stream or other line of defense, to
“ clear off the combustible material before an advancing
“ fire.

“ Section 24. The supervisor of every town of which
“ he is a fire-warden as aforesaid and in which a forest fire
“ of more than one acre in extent has occurred within a
“ year shall report to the forest commission the extent of
“ area burned over, to the best of his information, to-
“ gether with the probable amount of property destroyed,
“ specifying the value of timber, as near as may be, and
“ amount of cord wood, logs, bark or other forest product,
“ and of fencing, bridges and buildings that have been
“ burned. He shall also make inquiries and report as to
“ the causes of these fires, if they can be ascertained,
“ and as to the measures employed and found most ef-
“ fectual in checking their progress. A consolidated sum-
“ mary of these returns by counties and of the informa-
“ tion as to the same matter otherwise gathered by the
“ forest commission shall be included in the annual report
“ of the forest commission.

“ Section 25. Every railroad company whose road
“ passes through waste or forest lands, or lands liable to
“ be overrun by fires within this state, shall twice in each
“ year cut and burn off or remove from its right of way
“ all grass, brush or other inflammable material, but under
“ proper care, and at all times when the fires thus set are
“ not liable to spread beyond control.

“ Section 26. All locomotives which shall be run
“ through forest lands shall be provided, within one year

" from the date of this act, with approved and sufficient
" arrangements for preventing the escape of fire from
" their furnace or ash-pan, and netting of steel or iron
" wire upon their smoke-stack to check the escape of
" sparks of fire. It shall be the duty of every engineer
" and fireman employed upon a locomotive, to see that
" the appliances for the prevention of the escape of fire
" are in use and applied, as far as it can be reasonably
" and possibly done.

" Section 27. No railroad company shall permit its
" employees to deposit fire-coals or ashes upon their
" track in the immediate vicinity of woodlands or lands
" liable to be overrun by fires, and in all cases where any
" engineers, conductors or trainmen discover that fences
" along the right of way, on woodlands adjacent to the
" railroad, are burning, or in danger from fire, it shall be
" their duty to report the same at their next stopping
" place, and the person in charge of such station shall
" take prompt measures for extinguishing such fires.

" Section 28. In seasons of drought, and especially
" during the first dry time in the spring after the snows
" have gone and before vegetation has revived, railroad
" companies shall employ a sufficient additional number of
" trackmen for the prompt extinguishment of fires. And
" where a forest fire is raging near the line of their road
" they shall concentrate such help and adopt such measures
" as shall most effectually arrest their progress.

" Section 29. Any railroad company violating the pro-
" visions or requirement of this act shall be liable to a fine
" of one hundred dollars for each offense.

" Section 30. The forest commission shall, with as little
" delay as practicable, cause rules for the prevention and
" suppression of forest fires to be printed for posting in
" school-houses, inns, saw-mills and other wood-working
" establishments, lumber camps and other places, in such

" portions of the state as they may deem necessary. Any person maliciously or wantonly defacing or destroying such notices shall be liable to a fine of five dollars. It shall be the duty of forest agents, supervisors and school trustees to cause these rules, when received by them to be properly posted, and replaced when lost or destroyed.

" Section 31. Any person who shall wilfully or negligently set fire to, or assist another to set fire to any waste or forest lands belonging to the state or to another person, whereby the said forests are injured or endangered, or who suffers any fire upon his own land to escape or extend beyond the limits thereof, to the injury of the woodlands of another or of the state, shall be liable to a fine of not less than fifty dollars nor more than five hundred dollars, or to imprisonment of not less than thirty days nor more than six months. He shall also be liable in an action for all damages that may be caused by such fires; such action to be brought in any court of this state having jurisdiction thereof.

" Section 32. Fifteen thousand dollars is hereby appropriated out of any moneys in the treasury not otherwise appropriated, for the purposes of this act. And no liabilities shall be incurred by said forest commissioners in excess of this appropriation.

" Section 33. This act shall take effect immediately.

" Chap. 639, Laws of 1887.

" AN ACT to amend section seven of chapter two hundred and eighty-three of the laws of eighteen hundred and eighty-five, as amended by chapter two hundred and eighty of the laws of eighteen hundred and eighty-six, entitled 'An Act to establish a Forest Commission

“ and to define its powers and duties, and for the preservation of forests.’

“ Passed June 21, 1887; three fifths being present.

“ *The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

“ Section 1. Section seven of chapter two hundred and eighty-three of the laws of eighteen hundred and eighty-five, as amended by chapter two hundred and eighty of the laws of eighteen hundred and eighty-six, entitled ‘ An act to establish a Forest Commission and to define its powers and duties, and for the preservation of forests,’ is hereby amended so as to read as follows:

“ Section 7. All the lands now owned, or which may hereafter be acquired by the State of New York, within the counties of Clinton, except the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster, Sullivan and Oneida shall constitute and be known as the Forest Preserve.

“ Section 2. This act shall take effect immediately.

“ Chapter 37 of Laws of 1890.

“ AN ACT to authorize the purchase of lands located within such counties as include the forest preserve.

“ Approved by the Governor, March 11, 1890. Passed, three-fifths being present.

“ *The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

“ Section 1. The forest commission, with the approval and concurrence of the commissioners of the land office, may purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park, at a price not to exceed one

“ dollar and fifty cents per acre, such approval and concurrence to be endorsed on a copy of the resolution of the said forest commission authorizing such purchase, and certified to by the clerk of said commissioners of the land office.

“ Section 2. The forest commission may have such lands appraised by one or more appraisers, not to exceed three in number, to be appointed by that commission. The expenses of such appraisal shall be a per diem allowance to the appraisers, not to exceed three dollars per day for the time actually employed, and the necessary expenses incurred in each case, such expenses to be audited by the comptroller, and paid out of the funds appropriated by the legislature for the purposes of this act; but no purchase of lands shall be made in excess of previous appropriations for that purpose.

“ Section 3. The sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated for the purposes of this act; and no liability shall be incurred by said forest commission in excess of this appropriation.

“ Section 4. This act shall take effect immediately.

Chap. 707. Laws of 1892.

“ AN ACT to establish the Adirondack park and to authorize the purchase and sale of lands within the counties including the forest preserve.

“ Approved by the Governor, May 20, 1892. Passed, three-fifths being present.

“ *The People of the State of New York represented in Senate and Assembly, do enact as follows:*

“ Section 1. There shall be a state park established within the counties of Hamilton, Herkimer, St. Law-

“ rence, Franklin, Essex and Warren, which shall be
“ known as the Adirondack park, and which shall, sub-
“ ject to the provisions of this act, be forever reserved,
“ maintained and cared for as ground open for the free
“ use of all the people for their health or pleasure, and as
“ forest lands necessary to the preservation of the head-
“ waters of the chief rivers of the state, and a future
“ timber supply.

“ Section 2. For this purpose the forest commission
“ shall have power, as herein provided, to contract for the
“ purchase of land situated within the county of
“ Hamilton; the towns of Newcomb, Minerva, Schroon,
“ North Hudson, Keene, North Elba, St. Armand and
“ Wilmington, in the county of Essex; the towns of
“ Harrietstown, Santa Clara, Altamont, Waverly and
“ Brighton in the county of Franklin: the town of Wil-
“ murt in the county of Herkimer; the towns of Hop-
“ kinton, Colton, Clifton, and Fine, in the county of St.
“ Lawrence; and the towns of Johnsburg, Stony Creek
“ and Thurman, in the county of Warren.

“ Section 3. In any case where lands are situated
“ within the towns specified in section two, the purchase
“ of which lands will, in the opinion of the forest com-
“ mission, be advantageous to the state, but which can
“ not, as shall appear to the satisfaction of the forest com-
“ mission, be bought on advantageous terms, unless sub-
“ ject to leases or restrictions or to the right to remove
“ certain timber as hereinafter mentioned, the forest com-
“ mission may make a contract for the purchase of such
“ lands, providing that the contract and the deed or deeds
“ to be made in pursuance thereof shall be subject to such
“ leases, restrictions or right. But no lands shall be so
“ purchased subject to any right to remove hard wood
“ timber, or any trees of soft wood with a diameter of less
“ ten inches at the height of three feet from the ground,

" or subject to any rights, leases or restrictions, or the
" right to remove any timber after the period of ten years
" from the date of the conveyance.

" Section 4. The forest commission shall have power,
" from time to time, due notice having been given, to con-
" tract to sell and convey any portion of the lands within
" so much of the forest preserve as is now or hereafter may
" be situated within the counties of Clinton, Fulton,
" Lewis, Oneida, Saratoga, Washington, St. Lawrence,
" Franklin (except the town of Harrietstown), Herkimer
" (except the town of Wilmurt), Essex (except the towns
" of Newcomb and North Elba), the town of Hope, in the
" county of Hamilton, and the county of Warren, (ex-
" cepting however, therefrom, all islands in Lake George
" and all land upon the shore thereof), the ownership of
" which by the state is not, in the opinion of the forest
" commission needed to promote the purpose sought by
" this act, or by chapter two hundred and eighty-three
" of the laws of eighteen hundred and eighty-five. The
" proceeds of all such sales, as in this section provided,
" shall be paid to the treasurer of the state, and shall be
" held by him in a separate fund and as a special deposit,
" which shall at all times be available to the forest com-
" mission for the purpose of purchasing lands situated
" within the towns mentioned in section two of this act,
" at such price per acre as may be determined by the
" forest commission and approved by the commissioners of
" the land office as hereinafter provided.

" Section 5. All conveyances of lands belonging to the
" state which are to be delivered in pursuance of any con-
" tract authorized by section four shall be executed by the
" comptroller, and may contain such restrictions, reserva-
" tions or covenants as the forest commission shall deem
" to be promotive of the purposes sought by this act or by
" chapter two hundred and eighty-three, laws of eighteen

“ hundred and eighty-five. No contract made in pursuance
“ or under the authority of this act shall take effect until
“ the same shall have been approved by the commissioners
“ of the land office, such approval to be appended to the
“ copy of the resolution of the forest commission authoriz-
“ ing such contract, and certified by the clerk of the com-
“ missioners of the land office.

“ Section 6. Every conveyance executed in pursuance of
“ this act shall be certified by the attorney-general to be
“ in conformity with the contract, and shall otherwise be
“ approved by him as to form before the acceptance or
“ delivery thereof. Every conveyance to be received by
“ the forest commission, and executed in pursuance or
“ under the authority of this act, shall be made to the
“ people of the state of New York, as grantee, and shall
“ be recorded in the proper county or counties, and shall
“ after such record, be delivered by the forest commission
“ to the commissioners of the land office to be treated as
“ part of their archives.

“ Section 7. Payment for the purchase of land,
“ authorized by this act, shall be made upon the cer-
“ tificate of the forest commission and the audit of the
“ comptroller from moneys appropriated by this act for
“ the purchase of land or for moneys received from the
“ sale of lands as provided in section four. Such expenses
“ as may be necessarily incurred by the forest commission
“ in the preliminary examination of lands purchased or
“ sold under the authority of this act, or in the examina-
“ tion of title of lands purchased under this act, and all
“ other expenses incidental to the conveyances and pur-
“ chases so made shall be paid by the forest commission
“ from the appropriations made from time to time for the
“ purpose of such purchases or from the fund established
“ from the proceeds of the sale of lands as provided in
“ section four.

“Section 8. All lands now owned, or which may hereafter be acquired by the state within the towns mentioned in section two of this act (except such lands, in border towns, as may be sold in accordance with the provisions of section four) shall constitute the Adirondack park. The forest commission shall have the care, custody, control, and superintendence of the same, and shall have within the same and with reference thereto and every part thereof, and with reference to any acts committed thereon and persons committing the same, all the control, powers, duties, rights of action, and remedies now belonging or which shall hereafter belong to the forest commission or the commissioners of the land office, within, or with reference to the forest preserve or any part thereof, or with reference to any acts committed therein, or persons committing the same. The forest commission shall have power to prescribe and to enforce ordinances or regulations for the government and care of the Adirondack park, not inconsistent with the laws of the state of New York, or for the licensing or regulation of guides or other persons who shall be usually engaged in business thereon; to lay out paths and roads in the manner prescribed by law; to appoint the superintendent, inspectors, foresters, and all other officers or employes who are to be engaged in the care or administration of the park, and to fix their compensation, the same to be payable, however, only out of the appropriations made from time to time, for the expenses of the forest commission.

“Section 9. The forest commission shall have power to lease from time to time, as it may determine, tracts of land within the limits of the Adirondack park, not exceeding five acres in any one parcel, to any person, for the erection of camps or cottages for the use and accommodation of campers, such leases to be general in form

" except as to the term and amount of rental, and the
" term not to exceed five years, and the leases to contain
" strict conditions as to the cutting and protection of tim-
" ber, the prevention of fires, and a reservation of a right
" of passage over the same for travelers at all proper and
" reasonable times, and to contain a covenant on the part
" of the lessee or lessees to observe the ordinances or regu-
" lations of the forest commission, theretofore prescribed
" or thereafter to be prescribed, as the same may be from
" time to time. No exclusive fishing or hunting privilege
" shall be granted to any such lessees.

" Section 10. Except as in this act otherwise provided,
" the Adirondack park shall for all purposes, be deemed
" a part of the forest preserve. All laws for the protec-
" tion of the forest preserve shall be applicable to the
" Adirondack park, except as in this act otherwise pro-
" vided; and the forest commission may conduct the same
" prosecutions, and institute and maintain the same pro-
" ceedings, which it is, or shall be, entitled to conduct,
" institute or maintain with reference to any portion of
" the forest preserve; and all acts forbidden upon the
" forest preserve are, and shall be deemed forbidden within
" the Adirondack park except as herein otherwise pro-
" vided; and all violations of law upon the Adirondack
" park shall be subject to the same punishments and
" penalties as if such violation were committed upon any
" part of the forest preserve.

" Section 11. The foresters and other employes of the
" forest commission shall, when so directed by the forest
" commission, act as game and fish protectors; and as
" such they shall have all powers within the Adirondack
" park which game and fish protectors have, or shall have,
" under chapter five hundred and seventy-seven of the
" laws of eighteen hundred and eighty-eight, and any law
" hereafter to be enacted; and they shall from time to

" time make such report to the commissioner of fisheries
" as that board may require. Nothing in this act con-
" tained shall be construed to premit any violation within
" the Adirondack park of the game and fish laws of the
" state heretofore or hereafter to be enacted, or to restrict
" or alter as to such park any of the prohibitions or penal-
" ties prescribed or hereafter to be prescribed by such fish
" and game laws. It shall be the duty of the forest com-
" mission, with the concurrence and approval of the com-
" missioners of fisheries, to provide for the enforcement
" within the Adirondack park of such fish and game laws
" by such means as the forest commission shall deem wise,
" in addition to such other means as are or shall be pro-
" vided by law.

" Section 12. The forest commission shall include in its
" annual report an account of its proceedings with refer-
" ence to the Adirondack park, and shall make such
" recommendations with reference thereto as it shall deem
" wise. The forest commission shall state also in its
" annual report the number of acres purchased and sold
" during the year under the provisions of this act, the
" locality of the same, the prices paid or received, and all
" other information of importance connected with such
" transfers; and shall state the amount of money required
" in the next fiscal year for the purchase of lands and for
" the expenses of the park.

" Section 13. Chapter four hundred and seventy-five of
" the laws of eighteen hundred and eighty-seven, and all
" acts and parts of acts inconsistent with this act are, so
" far as they are inconsistent, hereby repealed.

" Section 14. This act shall take effect immediately.

Chapter 332, Laws 1893.

“ AN ACT in relation to the forest preserve and Adirondack park, constituting articles six and seven of chapter forty-three of the general laws.

“ Approved by the Governor April 7, 1893. Passed, three-fifths being present.

“ *The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

“ ARTICLE VI.

“ FOREST PRESERVE.

“ Section 100. Forest preserve.

“ 101. Forest commission.

“ 102. Powers and duties.

“ 103. Sale of timber in forest preserve.

“ 104. Accounts and annual report of forest commission.

“ 105. Partition of lands.

“ 106. Taxation of forest preserve.

“ 107. Duties of railroad companies.

“ 108. Powers and duties of certain officers in case of fire.

“ 109. Supervisors to be town protectors of land.

“ 110. Supervisors ex officio fire wardens.

“ 111. Supervisors to report fires.

“ 112. Actions for trespasses upon forest preserve.

“ 113. Penalty for setting fire to forest lands.

“ 114. Arrest of offenders without warrant.

“ 115. Deer parks in the Catskill region.

“ 116. Powers and duties of commissioner of agriculture as to forest preserve.

“ Section 100. FOREST PRESERVE. The forest preserve shall include the lands now owned or hereafter acquired

“ by the state within the counties of Clinton, except the
“ towns of Altona and Dannemora, Delaware, Essex,
“ Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida,
“ Saratoga, St. Lawrence, Warren, Washington, Greene,
“ Ulster and Sullivan, except

“ 1. Lands within the limits of any village or city and
“ 2. Lands, not wild lands, acquired by the state on
“ foreclosure of mortgages made to the commissioners for
“ loaning certain moneys of the United States usually
“ called the United States deposit fund.

“ Section 101. FOREST COMMISSION. There shall be a
“ forest commission consisting of five persons to be known
“ as the forest commissioners, appointed by the governor
“ by and with the advice and consent of the senate and
“ holding office for the term of five years. The commis-
“ sioners shall serve without compensation but shall be
“ paid for the reasonable expenses incurred in the per-
“ formance of their official duties not to exceed the sum
“ of five hundred dollars in any year to any commissioner.
“ The superintendent, assistant superintendent, the two
“ inspectors of forests and the secretary and clerks now
“ employed by the forest commission, shall continue on
“ the same terms and conditions until such employment
“ shall be terminated or modified by the forest commission.

“ Section 102. POWERS AND DUTIES. The forest com-
“ mission shall :

“ 1. Have the care, custody, control and superintend-
“ ence of the forest preserve.

“ 2. Maintain and protect the forests in the forest pre-
“ serve and promote as far as practicable the further
“ growth of the forest therein.

“ 3. Have charge of the public interests of the state
“ with regard to forestry and tree planting and especially
“ with reference to forest fires in every part of the state.

“ 4. Possess all the powers relating to forest preserve
“ which were vested in the commissioners of the land office
“ and in the comptroller on May fifteen, eighteen hundred
“ and eighty-five.

“ 5. Prescribe rules and regulations affecting the whole
“ or any part of the forest preserve and for its use, care
“ and administration and alter or amend the same; but
“ neither such rules or regulations nor anything contained
“ in this article shall prevent or operate to prevent the
“ free use of any road, stream or water as the same may
“ have been heretofore used, or as may be reasonably
“ required in the prosecution of any lawful business.

“ 6. Employ a superintendent, assistant superintendent,
“ two forest inspectors, twelve foresters and such clerical
“ force and agents as they may deem necessary, and fix
“ their compensation, but the expenses and salaries of
“ such employees shall not exceed in the aggregate, with
“ the other expenses of the commission the sum appro-
“ priated therefor by the legislature, and the amount
“ allowed to each forester for salary shall not exceed the
“ sum of seventy-five dollars a month.

“ 7. Take such measures as in the judgment of the com-
“ missioners may be proper, and the state superintendent
“ of public instruction and the regents of the university may
“ approve, for awakening an interest in behalf of forestry
“ in the common schools, academies and colleges of the
“ state, and of imparting elementary instruction on such
“ subject therein; and prepare and distribute the tracts
“ and circulars of information, giving plain and concise
“ instructions for the care of private wood lands and for
“ the growth of new forests upon lands that have been
“ denuded, exhausted by cultivation, eroded by torrents,
“ or injured by fire, or that are sandy, marshy, broken,
“ sterile, or waste and unfit for other use. These publica-
“ tions shall be furnished without cost to any citizen of

" the state on application, and proper measures may be
" taken for bringing them to the notice of persons who
" would be benefited thereby.

" 8. Cause rules for the prevention and suppression of
" forest fires to be printed for posting in school-houses,
" inns, saw-mills and other wood-working establishments,
" lumber camps and other places in such portions of the
" state as they may deem necessary. Forest inspectors,
" foresters, firewardens, supervisors and school trustees
" shall cause these rules when received by them, to be
" properly posted and replaced when lost or destroyed.
" Any person maliciously or wantonly defacing or destroy-
" ing any such notice shall forfeit to the people of the
" state, the sum of five dollars for every such offense.

" Section 103. SALE OF TIMBER ON FOREST PRESERVE.
" The forest commissioners may sell any spruce and tama-
" rack timber, which is not less than twelve inches in
" diameter at a height of three feet above the ground,
" standing in any part of the forest preserve, and poplar
" timber of such size as the forest commission may deter-
" mine, and the proceeds of such sales shall be turned
" over to the state treasurer, by whom they shall be placed
" to the credit of the special fund established for the pur-
" chase of lands within the Adirondack park.

" Section 104. ACCOUNTS AND ANNUAL REPORT OF
" FOREST COMMISSION. All income derived from state
" forest lands shall be paid over by the forest commission
" to the treasury of the state, and a strict account shall
" be kept of all receipts and expenses of the commission,
" which account shall be audited by the comptroller.
" The commission shall annually, in the month of Jan-
" uary, make a written report to the legislature of their
" receipts and expenses, and of all their proceedings, with
" such recommendations of further legislative or official
" action as they may deem proper.

“Section 105. PARTITION OF LANDS. Whenever the state owns an undivided interest with any person in lands of the forest preserve or holds and is in possession of such lands as joint tenant or tenant in common with any person who has a freehold estate therein, the attorney-general shall on the request of the forest commission, bring an action in the name of the people of the state, for the actual partition of such land; and on the written consent of the forest commission any such person may maintain an action for the actual partition of such land in the same manner as if the state were not entitled to exemption from legal proceedings, and service of process in such action upon the attorney-general shall be deemed service upon the state. Such actions, the proceedings and judgment therein and the proceedings under the judgment shall be according to the practice at the time prevailing in actions of partition and shall have the same force and effect as in other actions, except that no costs against the state shall be allowed in such actions and no sale of such lands shall be adjudged therein. The forest commission may without action, but with the consent of the comptroller, agree with any person or persons owning lands within the forest preserve jointly or as tenants in common, with the state for the partition of such lands, and on such agreement and consent, the comptroller shall make on behalf of the people of the state, any conveyance necessary or proper in such partition, and such conveyance shall be forthwith recorded as now provided by law as to conveyances made by the commissioners of the land office.

“Section 106. TAXATION OF FOREST PRESERVE. All wild or forest land within the forest preserve shall be assessed and taxed at a like valuation and rate as similar lands of individuals within the counties where situated. On or before August first in every year, the assessors of

“ the town within which the land so belonging to the state
“ are situated shall file in the office of the comptroller and
“ of the forest commission, a copy of the assessment-roll
“ of the town which in addition to the other matter now
“ required by law shall state and specify which and how
“ much, if any, of the lands assessed are forest lands, and
“ which and how much, if any, are lands belonging to the
“ state; such statements and specifications to be verified
“ by the oaths of a majority of the assessors. The comp-
“ troller shall thereupon and before the first day of Sep-
“ tember following, and after hearing the assessors and
“ forest commission if they or any of them so desire,
“ correct or reduce any assessment of state land which
“ may be in his judgment an unfair proportion to the
“ remaining assessment of land within the town, and shall
“ in other respects approve the assessment and communi-
“ cate such approval to the assessors. No such assessment
“ of state lands shall be valid for any purpose until the
“ amount of assessment is approved by the comptroller,
“ and such approval attached to and deposited with the
“ assessment-roll of the town and therewith delivered by
“ the assessors of the town to the supervisor thereof or
“ other officer authorized to receive the same from the
“ assessors. No tax for the erection of a school-house or
“ opening of a road shall be imposed on the state lands
“ unless such erection or opening shall have been first
“ approved in writing by the forest commission. Payment
“ of the lawful and just amount of the taxes imposed under
“ this section on lands so belonging to the state shall in
“ every year be made by the treasurer of the state, on the
“ certificate of the comptroller, by allowing to the treasurer
“ of the county in which such lands are situated a credit
“ of the amount of such taxes due on such lands payable
“ by such county treasurer in such year to the state for
“ state taxes; but no fees shall be allowed by the comp-

"troller to the county treasurers in adjusting their accounts
"for such portion of the state tax so paid.

"**Section 107. DUTIES OF RAILROAD COMPANIES.** Every
"railroad company whose road passes through waste or
"forest lands or lands liable to be overrun by fires within
"the state, shall twice in each year cut and remove from
"its right of way all grass, brush or other inflammable
"materials, but under proper care and at proper times
"when fire, if set, can be kept under control. All locomo-
"tives which run through forest lands shall be provided
"with approved and sufficient arrangements for preventing
"the escape of fire from their furnaces or ashpans and with
"netting of steel or iron wire upon their smoke stacks to
"prevent the escape of sparks of fire and every engineer
"and fireman employed upon a locomotive shall see that
"the appliances to prevent the escape of fire are in use and
"applied as far as it can be reasonably and practically
"done. No railroad company shall permit its employes
"to deposit fire coals or ashes upon their track in the
"immediate vicinity of woodlands, or lands liable to be
"overrun by fires, and where any engineers, conductors or
"trainmen discover that fences or other material or sub-
"stances along the right of way upon wood lands adjacent
"to the railroad are burning, or in danger from fire, they
"shall report the same at their next stopping place, and
"the person in charge of such station shall take prompt
"measures to extinguish such fires and shall immediately
"notify the nearest firewarden or forester. In seasons of
"drought and especially during the first dry time in the
"spring after the snows have gone and before vegetation
"has revived, railroad companies shall employ a sufficient
"number of trackmen for the prompt extinguishment of
"fires; and where a forest fire is raging near the line of
"their road, they shall concentrate such help and adopt
"such measures as shall most effectually arrest it prog-

"ress. If any railroad company or any of its employes
"violate any provision of this section the company shall
"forfeit to the people of the state the sum of one hundred
"dollars for every such violation.

"Section 108. POWERS AND DUTIES OF CERTAIN
"OFFICERS IN CASE OF FIRE. The forest commission,
"forest superintendent, forest inspector, foresters and
"other persons employed by or under the authority of
"the forest commission and who may be authorized by
"the commission to assume such duty, shall in a town
"within or a part of the forest preserve, whenever the
"woods in any such town shall be on fire, perform the
"duty imposed on them and in such case shall have the
"powers granted to justices of the peace, the super-
"visors and commissioners of highways with reference to
"the ordering of persons to assist in extinguishing fires
"or stopping their progress. The fire warden, or the
"supervisor, where acting in general charge, may cause
"fences to be destroyed or furrows to be ploughed, to
"check the running fire, or in case of great danger, back
"fires may be set along a road or stream or other line of
"defense, to clear off the combustible material before an
"advancing fire. No action for trespass shall be brought
"by any owner of land for entry made upon his premises
"by persons going to assist in extinguishing a forest fire
"although such fire may not be upon his land. The
"compensation for services of persons who may assist
"in extinguishing forest fires shall be a town charge and
"and shall not exceed the sum of two dollars per day for
"each person employed; but all bills for such services
"must be approved by the fire warden of the town in
"which the fire occurred before payment shall be made.

"Section 109. SUPERVISORS TO BE TOWN PROTECTORS
"OF LANDS. The supervisor of every town in the state

“ not within or a part of the forest preserve in which wild
“ or forest lands belonging to the state are located shall
“ be, by virtue of his office, the protector of such lands,
“ subject to the instructions he may receive from the
“ forest commission. He shall report to the district
“ attorney for prosecution any acts of spoliation or injury
“ that may be done, and such district attorney shall insti-
“ tute proceedings for the prevention of further trespass
“ and for the recovery of all damages committed, with
“ costs of prosecution. The supervisors shall report their
“ proceedings therein to the forest commission. In towns
“ where the forest commission deem it necessary, they
“ may serve a notice upon the supervisor, requiring him
“ to appoint one or more forest guards, and if more than
“ one in a town, the district of each shall be properly
“ defined. The guards so appointed shall have such
“ powers, perform such duties and receive such pay as
“ the forest commission may determine.

“ **Section 110. SUPERVISORS EX-OFFICIO FIRE WARDENS.**
“ Every supervisor of a town in this state, in which there
“ are no wild or forest lands of the forest preserve, and in
“ which no firewarden is appointed by the forest commis-
“ sion, shall be ex-officio firewarden therein, but the
“ supervisor may divide towns particularly exposed to
“ damages from forest fires into two or more districts,
“ bounded as far as may be by roads, streams of water or
“ dividing ridges of land or lot lines, and appoint in
“ writing one resident citizen in each district as district
“ firewarden therein. A description of these districts and
“ the names of the district firewardens thus appointed
“ shall be recorded in the office of the town clerk. The
“ supervisor may also cause a map of the fire districts of
“ his town to be posted in some public place with the
“ names of the district firewardens appointed. The cost
“ of such map, not exceeding five dollars, shall be a town

“ charge and the services of the firewarden shall also be
“ deemed a town charge and shall not exceed the sum of
“ two dollars per day for the time actually employed.
“ Within a town in which there are wild or forest lands
“ of the forest preserve, and in such other towns in the
“ counties mentioned in section one hundred of this
“ chapter, as the forest commission may designate, such
“ persons shall be firewardens as may, from time to time.
“ be appointed by the forest commission and shall act
“ during the pleasure of such commission and all the
“ provisions of this article with reference to supervisors
“ and district town wardens shall be applicable to them.
“ On the discovery of a forest fire or a fire in any woods,
“ the firewarden of the district, town or county in which
“ it shall be, shall take such measures as shall be neces-
“ sary for its extinction, and for this purpose he may call
“ on any person in the territory in which he acts or in its
“ vicinity for assistance, and any person refusing to act
“ when so called on, shall forfeit to the people of the
“ state the sum of ten dollars. Any justice of the peace
“ or commissioner of highways of the town in which any
“ such fire shall be, shall act as firewarden with respect
“ to any such fire, if the firewardens of the district, tow-
“ or county are not taking such measures for its ex-
“ tinguishment.

“ Section 111. SUPERVISORS TO REPORT FIRES. The
“ firewarden of every town in which a forest fire of more
“ than one acre in extent has occurred within a year, shall
“ report to the forest commission the extent of area burned
“ over to the best of his information, together with the
“ probable amount of property destroyed, specifying the
“ value of timber, as near as may be, and amount of cord-
“ wood, logs, bark, or other forest product, and of fences,
“ bridges and buildings that have been burned. He shall
“ make inquiries and report as to the causes of such fires,

" if ascertainable, and as to the measures employed and
" found most effectual in checking their progress. A con-
" solidated summary of these returns by counties and of
" the information as to the same matter otherwise gathered
" by the forest commission shall be included in their
" annual report.

" **Section 112. ACTIONS FOR TRESPASSES UPON FOREST
" PRESERVE.** The forest commission may bring in the
" name of the people of the state any action to prevent
" trespass upon or injury to the forest preserve and recover
" damages therefor or to recover lands properly forming
" part of the forest preserve but occupied or held by per-
" sons not entitled thereto, or for the maintenance and
" protection of the forest preserve, which any owner of
" lands would be entitled to bring: or for cutting or carry-
" ing away, or causing to be cut or assisting to cut, any
" tree or timber within the forest preserve or any bark
" thereupon, or removing any tree, timber or bark, or any
" portion thereof from such forest preserve. Every person
" violating the provisions of this section, relating to the
" cutting or carrying away any timber, trees or bark, shall
" forfeit to the state the sum of twenty-five dollars for
" every tree cut or carried away by him or under his direc-
" tion. The forest commission may, with the consent of
" the attorney-general and comptroller, employ attorneys
" and counsel to prosecute any such action or to defend
" any action brought against the commission or any of its
" members or subordinates arising out of their or his
" official conduct with relation to the forest preserve.
" Any attorney or counsel so employed shall act under
" the direction of and in the name of the attorney-general.
" Where such attorney or counsel is not so employed, the
" attorney-general shall prosecute and defend such actions.
" A preliminary or final injunction shall, on application in
" an action brought by or at the instance of the forest

" commission, be granted restraining any act of trespass, " waste or destruction upon the forest preserve. All such " actions for the prosecution shall be brought in the county " where the trespass is alleged to have been committed.

" **Section 113. PENALTY FOR SETTING FIRE TO FOREST LANDS.** Any person who shall wilfully or negligently " set fire to, or assist another to set fire to any waste or " forest lands belonging to the state or to another person, " whereby such forests are injured or endangered; or who " suffers any fire upon his own lands to escape or extend " beyond the limits thereof to the injury of the wood lands " of another or of the state, shall forfeit to the state for " every such offense not less than fifty nor more than five " hundred dollars, and be liable to the person injured for " all damages that may be caused by such fires.

" **Section 114. ARREST OF OFFENDERS WITHOUT WARRANT.** The forest superintendent, inspectors, foresters " and other persons acting upon the forest preserve under " the written employment of the superintendent or of the " forest commission, may, without warrant, arrest any " person found upon the forest preserve violating any of " the provisions of this article and forthwith take the per- " son so arrested before a magistrate having jurisdiction " to issue warrants in such cases and there make or pro- " cure to be made a complaint in writing, on which com- " plaint the magistrate shall act as the case may require.

" **Section 115. DEER PARKS IN THE CATSKILL REGION.** " The forest commission shall set apart tracts of land not " exceeding three of such size as they may deem proper, " belonging to the state in the Catskill region, now con- " stituting a part of the forest preserve, for the purpose " of breeding deer and wild game. The commission shall " purchase and turn out upon such lands such deer or " other game as they may think proper, and establish all

“ proper rules for the protection of such land and the
 “ game thereupon. No game shall be killed, pursued,
 “ trapped, or in any way destroyed within the limits of
 “ such land so set apart for the period of five years from
 “ the time that such lands shall have been so set apart.
 “ The forest commission may receive private subscriptions
 “ of money and expend the same for the purposes speci-
 “ fied in this section.

“ Section 116. POWERS AND DUTIES OF COMMISSIONER
 “ OF AGRICULTURE AS TO FOREST PRESERVE. On the ex-
 “ piration of the terms of office of the forest commissioners
 “ appointed pursuant to this chapter, the forest commis-
 “ sion shall cease and determine, and all its powers and
 “ duties shall devolve on the commissioner of agriculture.

“ ARTICLE VIII.

“ ADIRONDACK PARK.

- “ Sections 120. Adirondack Park.
- “ 121. Powers and duties of forest commis-
 “ sion.
- “ 122. Contracts and conveyances.
- “ 123. Proceeds of lands sold and payment
 “ for lands purchased.
- “ 124. Foresters and employes to act as game
 “ protectors.
- “ 125. Annual report.
- “ 126. Laws revealed.*
- “ 127. When to take effect.

“ Section 120. ADIRONDACK PARK. All lands now
 “ owned or hereafter acquired by the State within the
 “ county of Hamilton; the towns of Newcomb, Minerva,
 “ Schroon, North Hudson, Keene, North Elba, Saint Ar-

* So in the original.

" mand and Wilmington, in the county of Essex; the
" towns of Harrietstown, Santa Clara, Altamont, Waverly
" and Brighton, in the county of Franklin; the town
" of Wilmurt, in the county of Herkimer; the towns of
" Hopkington, Colton, Clifton and Fine, in the county of
" Saint Lawrence, and in the towns of Johnsburgh, Stony
" Creek and Thurman, and the islands in Lake George,
" in the county of Warren, except such lands as may be
" sold as provided in this article, shall constitute the Adi-
" rondack park. Such park shall be forever reserved,
" maintained and cared for as ground open for the free
" use of all the people for their health and pleasure and
" as forest lands, necessary to the preservation of the
" headwaters of the chief rivers of the State, and a future
" timber supply; and shall remain part of the forest pre-
" serve.

" Section 121. POWERS AND DUTIES OF FOREST COM-
" MISSION. The forest commission shall have the care,
" custody, control and superintendence of the Adirondack
" park, and within the same and with reference thereto
" and to acts committed therein and to persons commit-
" ting the same, all the control, powers, duties, rights of
" action and remedies belonging to such commission or
" the commissioners of the land office within and with
" reference to the forest preserve as to acts committed
" therein and persons committing the same. The forest
" commission shall have power:

" 1. To contract as herein provided for the purchase of
" land situated within the bounds of the park as defined
" in the preceding section; if any such lands can not be
" purchased on advantageous terms unless subject to
" leases or restrictions or the right to remove soft wood
" timber, the contract may provide accordingly, but not
" for any such right, lease or restriction after ten years
" from the date of the contract, nor for the right to remove

"any such trees with a diameter of less than twelve inches
"at the height of three feet from the ground.

"2. To contract as herein provided, on giving notice by
"publication for at least thirty days in at least two news-
"papers published in the county where the lands are situ-
"ated, to sell and convey any part of the forest preserve
"within the counties of Clinton, Fulton, Lewis, Oneida,
"Saratoga, Washington, Saint Lawrence, Franklin,
"(except the town of Harrietstown), Herkimer (except
"the town of Wilmurt), Essex (except the towns of New-
"comb and North Elba) and Warren (except the islands
"in Lake George and land upon the shore thereof), the
"ownership of which is not in the opinion of the com-
"mission needed to promote the purposes of this or the
"preceding article. All such sales shall be made on sealed
"bids and to the highest bidder; but the commissioners
"must reserve the right to reject all bids.

"3. To contract with owners of land situated within
"the bounds of the part that such lands may become
"part of the park subject* to the provisions of this arti-
"cle, in consideration of the exemption of such lands
"from taxation for state and county purposes which con-
"tract shall contain a provision that the owners of such
"land and their grantees shall refrain forever from remov-
"ing any of the timber thereupon except spruce, tamarack
"or poplar timber twelve inches in diameter at a height
"of three feet above the ground or fallen, burned or
"blighted timber and such other and further conditions
"as to the right of occupancy of such lands by such own-
"ers or their grantees as may be equitable. Such con-
"tract may also reserve to the owners of such forest lands
"and their grantees the privilege of clearing portions of
"such lands for agricultural or domestic purposes under
"regulations to be prescribed by the forest commissioners,

* So in the original.

" but no such privilege shall give to the owners or grantees
" of said lands, the right to clear more than one acre
" within the boundary of each one hundred acres covered
" by said contract.

" 4. To lease from time to time for a term not longer
" than five years, land within the forest preserve, not
" more than five acres in one parcel to any person, for
" the erection of camps or cottages for the use and accom-
" modation of campers. Such leases shall contain strict
" conditions as to the cutting and protection of timber
" and the prevention of fires, a reservation for travelers of
" the right of passage over the land leased at all proper
" and reasonable times and a covenant on the part of the
" lessee to observe all ordinances or regulations of the
" forest commission theretofore or thereafter to be pre-
" scribed; and no exclusive privilege of fishing or hunt-
" ing shall be granted to any person. All revenues re-
" ceived from such leases shall be paid into the state
" treasury and shall be placed to the credit of the special
" fund established for the purchase of lands within the
" Adirondack park.

" 5. To prescribe and enforce ordinances and regula-
" tions for the government and care of the park and for
" the licensing or regulation of guides or other persons
" engaged in business therein.

" 6. To lay out paths and roads in the park.

" 7. To sell the standing spruce, tamarack and poplar
" timber, the fallen timber and the timber injured by
" blight or fire, or any of the state forest lands under
" such regulations and restrictions as the forest commis-
" sion may prescribe, provided, however, that no such
" standing timber except poplar shall be sold which shall
" measure twelve inches or less in diameter at least three
" feet from the ground. All proceeds from such sales
" shall be turned over to the state treasurer, by whom

"they shall be placed to the credit of the special fund
"established for the purchase of land within the Adiron-
"dack park.

"Section 122. CONTRACTS AND CONVEYANCES. A
"contract mentioned in this article shall not take effect
"until approved by the commissioners of the land office;
"a certificate of which approval, certified by the clerk of
"said commissioners shall be attached to the copy of the
"resolution of the forest commission authorizing such con-
"tract. Every conveyance mentioned in this article shall
"be certified by the attorney-general to be in conformity
"with the contract and approved by him as to form before
"the acceptance or delivery thereof; those to be received
"by the commission shall be made to the people of the
"state, recorded in the proper county and after record
"delivered to the commissioners of the land office as a
"part of their archives; those for land sold by the state
"shall be executed by the comptroller and may contain
"any restrictions, reservations or covenants which the
"commission deem proper to promote the purposes of this
"or the preceding article.

"Section 123. PROCEEDS OF LANDS SOLD AND PAYMENT
"FOR LANDS PURCHASED. The proceeds of lands sold under
"this article shall be paid to the state treasurer and held
"by him as a separate fund and special deposit at all
"times available for the purchase of other lands under
"this article. Payment for such purchases and for ex-
"penses, necessarily incurred by the commission in the
"preliminary examinations of lands purchased or sold
"under authority of this article, or in the examination of
"titles of lands so purchased, or otherwise necessarily
"incidental to such purchases or conveyances, may be
"made from such fund or from any moneys appropriated
"therefor on the certificate of the commission and audit
"of the comptroller.

“Section 124. FORESTERS AND EMPLOYES TO ACT AS
“GAME PROTECTORS. The foresters and other employes
“of the commission shall, when so directed by the com-
“mission, act as game protectors, and possess all powers
“within the park, conferred on such protectors by law;
“they shall make such reports to the commissioners of
“fisheries as that commission from time to time may
“require. The forest commission, with the approval of
“the commissioners of fisheries, shall provide for the
“enforcement of the game law within the park by such
“lawful means as such commission deem wise, in addition
“to such other means as are provided by law.

“Section 125. ANNUAL REPORT. The forest commis-
“sion shall include in its annual report an account of its
“proceedings with reference to the park, including a state-
“ment of the number of acres of land purchased or sold
“during the year, the locality thereof, the price paid or
“received, the amount of timber sold and the prices received
“therefor, the revenue from leases, and all other informa-
“tion of importance connected with such transfers and
“transactions; and shall state the amount of money
“required in the next fiscal year for the purchase of lands
“and expenses of the park, and make such recommenda-
“tions with reference thereto as it deems wise.

“Section 126. LAWS REPEALED. Of the laws enu-
“merated in the schedule hereto annexed, that portion
“specified in the last column is repealed.

“Section 127. WHEN TO TAKE EFFECT. This chapter
“shall take effect immediately.

" SCHEDULE OF LAWS REPEALED.

" REVISED STATUTES.		SECTIONS
" PART 1, CHAPTER 17, TITLE 3.		1-4
" LAWS OF.	CHAPTER.	SECTIONS.
" 1841	169	all, except §§ 3 & 6
" 1844	336	all
" 1848	299	all, except §§ 3 & 6
" 1869	167	all
" 1878	134	all
" 1879	306	all
" 1880	592	all
" 1881	300	all
" 1882	215	all
" 1882	238	all
" 1882	246	all
" 1883	13	all
" 1884	202	all
" 1884	418	all
" 1884	474	all
" 1885	183	all, except § 26
" 1885	283	all
" 1885	127*	all
" 1885	458	all
" 1886	280	all
" 1886	577	all, except that part of § 6 design- ated as § 24
" 1887	155	all
" 1887	223	all
" 1887	403	all
" 1887	430	all
" 1887	475	all
" 1887	562	all
" 1887	583	all
" 1888	286	all

* So in the original.

“ LAWS OF	CHAPTER.	SECTIONS.
“ 1888	298	all
“ 1888	520	all
“ 1888	550	all
“ 1889	24	all
“ 1889	148	all
“ 1889	515	all
“ 1889	538	all
“ 1890	8	all
“ 1891	140	all
“ 1891	354	1, 2
“ 1892	501	all
“ 1892	707	all

“ Chap. 395,” Laws 1895.

“ ARTICLE XII.

“ FOREST PRESERVE.

- “ Section 270. Forest preserve.
- “ 271. Powers and duties.
- “ 272. Accounts and annual report of board of
 - “ fisheries, game and forest relative
 - “ to the forest preserve.
- “ 273. Partition of lands.
- “ 274. Taxation of forest preserve.
- “ 275. Duties of railroad companies.
- “ 276. Powers and duties of certain officers in
 - “ case of fire.
- “ 277. Supervisors to be town protectors of
 - “ land.
- “ 278. Supervisors ex officio, fire wardens.
- “ 279. Supervisors to report fires.
- “ 280. Actions for trespass upon forest preserve.
- “ 281. Penalty for setting fire to forest lands.
- “ 282. Arrest of offenders without warrant.
- “ 283. Deer parks in the Catskill region.

“ Section 270. FOREST PRESERVE. The forest preserve
“ shall include the lands owned or hereafter acquired by
“ the State within the counties of Clinton, except the
“ towns of Altona and Dannemora, Delaware, Essex,
“ Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida,
“ Saratoga, St. Lawrence, Warren, Washington, Greene,
“ Ulster and Sullivan, except

“ 1. Lands within the limits of any village or city and
“ 2. Lands, not wild lands, acquired by the State on
“ foreclosure of mortgages made to the commissioner for
“ loaning certain moneys of the United States, usually
“ called the United States deposit fund.

“ Section 271. POWERS AND DUTIES. The board of
“ fisheries, game and forest, shall:

“ 1. Have the care, custody, control and superintend-
“ ence of the forest preserve.

“ 2. Maintain and protect the forests in the forest pre-
“ serve, and promote as far as practicable the further
“ growth of the forest therein.

“ 3. Have charge of the public interests of the State
“ with regard to forestry and tree planting, and especially
“ with reference to forest fires in every part of the state.

“ 4. Possess all the powers relating to forest preserve
“ which were vested in the commissioners of the land
“ office, and in the comptroller on May fifteen, eighteen
“ hundred and eighty-five.

“ 5. Prescribe rules and regulations affecting the whole
“ or any part of the forest preserve and for its use, care
“ and administration and alter or amend the same; but
“ neither such rules or regulations nor anything contained
“ in this article shall prevent or operate to prevent the
“ free use of any road, stream or water as the same may
“ have been heretofore used, or as may be reasonably re-
“ quired in the prosecution of any lawful business.

“ 6. Take such measures as in the judgment of the

" commissioners may be proper, and the State superintendent of public instruction and the regents of the university may approve, for awakening an interest in behalf of forestry in the common schools, academies and colleges of the State and of imparting elementary instruction on such subject therein; and prepare and distribute the tracts and circulars of information, giving plain and concise instructions for the care of private wood lands and for the growth of new forests upon lands that have been denuded, exhausted by cultivation, eroded by torrents, or injured by fire, or that are sandy, marshy, broken, sterile, or waste and unfit for other use. These publications shall be furnished without cost to any citizen of the State on application, and proper measures may be taken for bringing them to the notice of persons who would be benefited thereby.

" 7. Cause rules for the prevention and suppression of forest fires to be printed for posting in school-houses, inns, saw-mills and other wood-working establishments, lumber camps and other places in such portions of the State as they may deem necessary. Forest inspectors, foresters, firewardens, supervisors and school trustees shall cause these rules when received by them, to be properly posted and replaced when lost or destroyed. Any persons maliciously or wantonly defacing or destroying any such notice shall forfeit to the people of the State, the sum of five dollars for every such offense.

" **Section 272. ACCOUNTS AND ANNUAL REPORT OF THE BOARD OF FISHERIES, GAME AND FOREST, RELATIVE TO THE FOREST PRESERVE.** All income from State forest lands, including receipts for trespasses, shall be paid over by the board of fisheries, game and forest to the State treasurer, by whom it shall be placed to the credit of the special fund established for the purchase of lands within the Adirondack park, and a strict account shall

“ be kept of all receipts and expenses of the commission,
“ which account shall be audited by the comptroller. The
“ commission shall, annually, in the month of January,
“ make a written report to the legislature of their receipts
“ and expenses, and of all their proceedings, with such
“ recommendations of further legislative or official action
“ as they may deem proper.

Section 273. PARTITION OF LANDS. Whenever the State
“ owns an undivided interest with any person in lands of
“ the forest preserve or holds and is in possession of such
“ lands as joint tenant or tenant in common with any per-
“ son who has a freehold estate therein, the attorney-
“ general shall on the request of the board of fisheries,
“ game and forest, bring an action in the name of the
“ people of the State, for the actual partition of such land ;
“ and on the written consent of the board such person may
“ maintain an action for the actual partition of such land
“ in the same manner as if the State were not entitled to
“ exemption from legal proceedings, and service of pro-
“ cess in such action upon the attorney-general shall be
“ deemed service upon the State. Such actions, the pro-
“ ceedings and judgment therein and the proceedings
“ under the judgment shall be according to the practice at
“ the time prevailing in actions of partition, and shall have
“ the same force and effect as in other actions, except that
“ no costs against the State shall be allowed in such actions
“ and no sale of such lands shall be adjudged therein.
“ The board of fisheries, game and forest may without
“ action, but with the consent of the comptroller, agree
“ with any person or persons owning lands within the
“ forest preserve jointly or as tenants in common, with the
“ State for the partition of such lands, and on such agree-
“ ment and consent, the comptroller shall make on behalf
“ of the people of the State, any conveyance necessary or
“ proper in such partition, and such conveyance shall be

" forthwith recorded as now provided by law as to conveyances made by the commissioners of the land office.

" Section 274. TAXATION OF FOREST PRESERVE. All
" wild or forest land within the forest preserve shall be
" assessed and taxed at a like valuation, and rate as
" similar lands of individuals within the counties where
" situated. On or before August first in every year, the
" assessors of the town within which the lands so belong-
" ing to the State are situated shall file in the office of the
" comptroller and of the board of fisheries, game and
" forest, a copy of the assessment-roll of the town which
" in addition to the other matter now required by law
" shall state and specify which and how much, if any, of
" the lands assessed are forest lands, and which and how
" much, if any, are lands belonging to the State; such
" statements and specifications to be verified by the oaths
" of a majority of the assessors. The comptroller shall
" thereupon and before the first day of September follow-
" ing, and after hearing the assessors and board of fish-
" eries, game and forest, if they or any of them so desire,
" correct or reduce any assessment of State land which
" may be in his judgment an unfair proportion to the re-
" maining assessment of land within the town, and shall in
" other respects approve the assessment and communicate
" such approval to the assessors. No such assessment of
" State lands shall be valid for any purpose until the
" amount of assessment is approved by the comptroller,
" and such approval attached to and deposited with the
" assessment-roll of the town and therewith delivered by
" the assessors of the town to the supervisor thereof or
" other officer authorized to receive the same from the
" assessors. No tax for the erection of a school-house or
" opening a road shall be imposed on the State lands un-
" less such erection or opening shall have been first
" approved in writing by the board of fisheries, game and

" forest. Payment of the lawful and just amount of the
" taxes imposed under this section on lands so belonging
" to the State shall, in every year, be made by the treasurer
" of the State, on the certificate of the comptroller, by
" allowing to the treasurer of the county in which such
" lands are situated a credit of the amount of such taxes
" due on such lands payable by such county treasurer in
" such year to the State for State taxes; but no fees shall
" be allowed by the comptroller to the county treasurers
" in adjusting their accounts for such portion of the State
" tax so paid.

" **Section 275. DUTIES OF RAILROAD COMPANIES.** Every
" railroad company whose road passes through waste or
" forest lands or lands liable to be overrun by fires
" within the State, shall twice in each year cut and re-
" move from its right of way all grass, brush or other in-
" flammable materials, but under proper care and at
" proper times when fire, if set, can be kept under control.
" All locomotives which run through forest lands shall be
" provided with approved and sufficient arrangements for
" preventing the escape of fires from their furnaces or ash-
" pans, and with netting of steel or iron wire upon their
" smoke stacks to prevent the escape of sparks of fire,
" and every engineer and fireman employed upon a loco-
" motive shall see that the appliances to prevent the
" escape of fire are in use and applied as far as it can be
" reasonably and practically done. No railroad company
" shall permit its employes to deposit fire coals or ashes
" upon their track in the immediate vicinity of wood-
" lands, or lands liable to be overrun by fires, and where
" any engineers, conductors or trainmen discover that
" fences or other material or substances along the right
" of way upon woodlands adjacent to the railroad are
" burning, or in danger from fire, they shall report the
" same at their next stopping place, and the person in

“ charge of such station, shall take prompt measures to
“ extinguish such fires, and shall immediately notify the
“ nearest fire warden or fish and game protector and
“ forester. In seasons of drought and especially during
“ the first dry time in the spring after the snows have
“ gone, and before vegetation has revived, railroad com-
“ panies shall employ a sufficient number of trackmen for
“ the prompt extinguishment of fires; and where a forest
“ fire is raging near the line of their road they shall con-
“ centrate such help and adopt such measures as shall
“ most effectually arrest its progress. If any railroad com-
“ pany or any of its employes violate any provision of
“ this section the company shall forfeit to the people
“ of the State the sum of one hundred dollars for every
“ such violation.

“ **Section 276. POWERS AND DUTIES OF CERTAIN OFFICERS
“ IN CASE OF FIRE.** The board of fisheries, game and
“ forest, fish and game protectors and foresters, and other
“ persons employed by or under the authority of the board of
“ fisheries, game and forest, and who may be authorized by
“ the board to assume such duty, shall in a town within or
“ a part of the forest preserve, whenever the woods in any
“ such town shall be on fire, perform the duty imposed
“ on them, and in such case shall have the powers granted to
“ justices of the peace, the supervisors and commissioners
“ of highways with reference to the ordering of persons
“ to assist in extinguishing fires or stopping their progress.
“ The fire warden, or the supervisor, where acting in gen-
“ eral charge, may cause fences to be destroyed or furrows
“ to be ploughed, to check the running of fire, or in case
“ of great danger, back fires may be set along a road or
“ stream or other line of defense, to clear off the com-
“ bustible material before an advancing fire. No action
“ for trespass shall be brought by any owner of land for
“ entry made upon his premises by persons going to assist

“ in extinguishing a forest fire although such fire may not
“ be upon his land. The compensation for services of per-
“ sons who may assist in extinguishing forest fires shall
“ be a State charge and shall not exceed the sum of two
“ dollars per day for each person employed; such com-
“ pensation shall be paid by the State treasurer on the
“ warrant of the comptroller, on certificates approved by
“ the fire warden of the town in which the fire occurred,
“ and by the board of fisheries, game and forest.

“ **Section 277. SUPERVISORS TO BE TOWN PROTECTORS
OF LANDS.** The supervisor of every town in the State
“ not within or a part of the forest preserve in which wild
“ or forest lands belonging to the State are located shall
“ be, by virtue of his office, the protector of such lands,
“ subject to the instructions he may receive from the
“ board of fisheries, game and forest. He shall report to
“ the district attorney for prosecution any acts of spolia-
“ tion or injury that may be done, and such district attor-
“ ney shall institute proceedings for the prevention of
“ further trespass and for the recovery of all damages
“ committed, with costs of prosecution. The supervisors
“ shall report their proceedings therein to the board of
“ fisheries, game and forest. In towns where the board
“ deems it necessary, it may serve a notice upon the super-
“ visor, requiring him to appoint one or more forest
“ guards, and if more than one in a town, the district of
“ each shall be properly defined. The guards so appointed
“ shall have such powers, perform such duties and receive
“ such pay as the board of fisheries, game and forest may
“ determine.

“ **Section 278. SUPERVISORS EX-OFFCIO FIRE WARDENS.**
“ Every supervisor of a town in this State, in which there
“ are no wild or forest lands of the forest preserve, and
“ in which no fire warden is appointed by the board of

“fisheries, game and forest, shall be ex-officio fire warden
“therein, but the supervisor may divide towns particularly
“exposed to damages from forest fires into two or more
“districts, bounded as far as may be by roads, streams of
“water or dividing ridges of land or lot lines, and appoint
“in writing one resident citizen in each district as district
“fire warden therein. A description of these districts
“and the names of the district fire wardens thus appointed
“shall be recorded in the office of the town clerk. The
“supervisor may also cause a map of the fire districts of
“his town to be posted in some public place with the
“names of the district fire wardens appointed. The cost
“of such map, not exceeding five dollars, shall be a town
“charge, and the services of the fire warden shall also be
“deemed a town charge and shall not exceed the sum of
“two dollars per day for the time actually employed.
“Within a town in which there are wild or forest lands
“of the forest preserve, and in such other towns in the
“counties mentioned in section two hundred and seventy
“of this chapter as the board of fisheries, game and forest
“may designate, such persons shall be fire wardens as
“may, from time to time, be appointed by the board of
“fisheries, game and forest, and shall act during the
“pleasure of such board, and all the provisions of this
“article with reference to supervisors and district town
“wardens shall be applicable to them, except that any
“expense incurred by such fire wardens shall be a State
“charge. On the discovery of a forest fire or a fire in
“any woods, the fire warden of the district, town or
“county in which it shall be, shall take such measures as
“shall be necessary for its extinction, and for this pur-
“pose he may call on any person in the territory in
“which he acts or in its vicinity for assistance, and any
“person refusing to act when so called on, shall forfeit
“to the people of the State the sum of ten dollars. Any

" justice of the peace or commissioner of highways of the
" town in which any such fire shall be, shall act as fire
" warden with respect to any such fire, if the fire wardens
" of the district, town or county are not taking such
" measures for its extinguishment.

" **Section 279. SUPERVISORS TO REPORT FIRES.** The
" fire warden of every town in which a forest fire of more
" than one acre in extent has occurred within a year,
" shall report to the board of fisheries, game and forest,
" the extent of area burned over, to the best of his in-
" formation, together with the probable amount of prop-
" erty destroyed, specifying the value of timber, as near
" as may be, and amount of cord-wood, logs, bark, or
" other forest product, and of fences, bridges and build-
" ings that have been burned. He shall make inquiries
" and report as to the causes of such fires, is ascertainable
" and as to the measures employed and found most effect-
" ual in checking their progress. A consolidated sum-
" mary of these returns by counties and of the informa-
" tion as to the same matter otherwise gathered by the
" board of fisheries, game and forest shall be included in
" their annual report.

" **Section 280. ACTIONS FOR TRESPASSES UPON FOREST
" PRESERVE.** The board of fisheries, game and forest may
" bring in the name of the people of the State any action
" to prevent trespass upon or injury to the forest pre-
" serve and recover damages therefor or to recover lands
" properly forming part of the forest preserve but occupied
" or held by persons not entitled thereto, or for the main-
" tenance and protection of the forest preserve, which
" any owner of lands would be entitled to bring; or for
" cutting or carrying away, or causing to be cut or assist-
" ing to cut, any trees or timber within the forest preserve
" or any bark thereupon, or removing any tree, timber

“ or bark, or any portion thereof from such forest pre-
“ serve. Every person violating the provisions of this
“ section, relating to the cutting or carrying away any
“ timber, trees or bark, shall forfeit to the State the sum
“ of twenty-five dollars for every tree cut or carried away
“ by him or under his direction. The board of fisheries,
“ game and forest may, with the consent of the attorney-
“ general and comptroller, employ attorneys and counsel
“ to prosecute any such action or to defend any action
“ brought against the board or any of its members or sub-
“ ordinates arising out of their or his official conduct with
“ relation to the forest preserve. Any attorney or coun-
“ sel so employed shall act under the direction of and in
“ the name of the attorney-general. Where such at-
“ torney or counsel is not so employed, the attorney-
“ general shall prosecute and defend such actions. A
“ preliminary or final injunction shall, on application in
“ an action brought by or at the instance of the board of
“ fishers, game and forest, be granted restraining any act
“ of trespass, waste or destruction upon the forest pre-
“ serve. All such actions for the prosecution shall be
“ brought in the county where the trespass is alleged to
“ have been committed.

“ Section 281. PENALTY FOR SETTING FIRE TO FOREST
“ LANDS. Any person who shall wilfully or negligently
“ set fire to, or assist another to set fire to any waste or
“ forest lands belonging to the State or to another person,
“ whereby such forests are injured or endangered; or who
“ suffers any fire upon his own lands to escape or extend
“ beyond the limits thereof to the injury of the wood lands
“ of another or of the State, shall forfeit to the State for
“ every such offense not less than fifty nor more than five
“ hundred dollars, and be liable to the person injured for
“ all damages that may be caused by such fires.

“ Section 282. ARREST OF OFFENDERS WITHOUT WARRANT. The fish and game protectors and foresters, and other persons acting upon the forest preserve under the written employment of the board of fisheries, game and forest, may, without warrant, arrest any person found upon the forest preserve violating any of the provisions of this article and forthwith take the person so arrested before a magistrate having jurisdiction to issue warrants in such cases, and there make or procure to be made a complaint in writing, on which complaint the magistrate shall act as the case may require.

“ Section 283. DEER PARKS IN THE CATSKILL REGION. The board of fisheries, game and forest shall set apart tracts of land (not exceeding three) of such size as they may deem proper, belonging to the State and including such adjoining lands as may be deemed necessary, in the Catskill region, now constituting that part of the forest preserve situated in the counties of Delaware, Greene, Sullivan and Ulster, for the purpose of breeding deer and wild game. The board of fisheries, game and forest shall purchase and turn out upon such lands such deer or other game as they may think proper and establish all proper rules for the protection of such land and the game thereupon. No game shall be killed, pursued, or trapped or in any way destroyed within the limits of such land so set apart for the period of five years from the time that such land shall be so set apart. The board may receive private subscriptions of money and expend the same for the purposes specified in this section, and may, from time to time, enlarge the area of any such park by purchasing other lands adjacent thereto, so as to include as large an acreage of State lands as practicable within the bounds of each park. The proceeds of the lands sold prior to January first, eighteen hundred and ninety-five, shall be used for no other purpose than

“ the purchase of additional lands for such parks, and the
 “ board may execute and receive and accept, in the name
 “ of the State, all contracts and conveyances necessary to
 “ carry into effect the provisions of this section.

“ ARTICLE XIII.

“ ADIRONDACK PARK.

“ Section 290. Adirondack park.

“ 291. Powers and duties of forest commission.

“ 292. Contracts.

“ 293. Proceeds of lands sold and payment for
 “ lands purchased.

“ 294. Revenues from leases made prior to
 “ January first, eighteen hundred and
 “ ninety-five.

“ 295. Annual report.

“ Section 290. ADIRONDACK PARK. All lands now
 “ owned or hereafter acquired by the State within the
 “ county of Hamilton; the towns of Newcomb, Minerva,
 “ Schroon, North Hudson, Keene, North Elba, Saint
 “ Amand and Wilmington, in the county of Essex; the
 “ towns of Harrietstown, Santa Clara, Altamont, Waverly
 “ and Brighton, in the county of Franklin; the town of
 “ Wilmurt, in the county of Herkimer; the towns of
 “ Hopkinson, Colton, Clifton and Fine, in the county of
 “ Saint Lawrence, and the towns of Johnsburgh, Stony
 “ Creek, and Thurman, and the islands in Lake George,
 “ in the county of Warren; except such lands as may be
 “ sold as provided in this article, shall constitute the
 “ Adirondack park. Such park shall be forever reserved,
 “ maintained and cared for as ground open for the free
 “ use of all the people for their health and pleasure and
 “ as forest lands, necessary to the preservation of the
 “ headwaters of the chief rivers of the State, and a future

“ timber supply ; and shall remain part of the forest pre-
“ serve.

“ **Section 291. POWERS AND DUTIES OF FOREST COM-
“ MISSION.** The board of fisheries, game and forest shall
“ have the care, custody, control and superintendence
“ of the Adirondack park, and within the same and with
“ reference thereto and to acts committed therein and to
“ persons committing the same, all the control, powers,
“ duties, rights of action and remedies belonging to such
“ board or the commissioners of the land office within and
“ with reference to the forest preserve as to acts com-
“ mitted therein and persons committing the same. The
“ board of fisheries, game and forest shall have power :

“ 1. To contract as herein provided for the purchase of
“ land situated within the bounds of the park as defined
“ in the preceding section ; if any such lands cannot be
“ purchased on advantageous terms unless subject to
“ leases or restrictions or the right to remove soft wood
“ timber, the contract may provide accordingly, but not
“ for any such right, lease or restriction after ten years
“ from the date of the contract, nor for the right to re-
“ move any such trees with a diameter of less than twelve
“ inches at the height of three feet from the ground.

“ 2. To contract with owners of land situated within
“ the bounds of the park that such lands may become part
“ of the park and subject to the provisions of this article,
“ in consideration of the exemption of such lands from
“ taxation for State and county purposes, which contract
“ shall contain a provision that the owners of such land
“ and their grantees shall forever refrain from removing
“ any of the timber thereupon except spruce, tamarack or
“ poplar timber twelve inches in diameter, at a height of
“ three feet above the ground, or fallen, burned or blighted
“ timber, and such other and further conditions as to the
“ right of occupancy of such lands by such owners or their

“ grantees as may be equitable. Such contract may also
“ reserve to the owners of such forest lands and their gran-
“ tees the privilege of clearing portions of such lands for
“ agricultural or domestic purposes under regulations to
“ be prescribed by the forest commissioners, but no such
“ privilege shall give to the owners or grantees of said
“ lands, the right to clear more than one acre within the
“ boundary of each one hundred acres covered by said
“ contract.

“ 3. To prescribe and enforce ordinances and regulations
“ for the government and care of the park and for licens-
“ ing or regulation of guides or other persons engaged in
“ business therein.

“ 4. To lay out paths and roads in the park.

“ **Section 292. CONTRACTS.** A contract mentioned in this
“ article shall not take effect until approved by the com-
“ missioners of the land office; a certificate of which
“ approval, certified by the clerk of said commissioners,
“ shall be attached to the copy of the resolution of the
“ board of fisheries, game and forest, authorizing such
“ contract. Every conveyance mentioned in this article
“ shall be certified by the attorney-general to be in con-
“ formity with the contract, and approved by him as to
“ form before the acceptance or delivery thereof, and shall
“ be made to the people of the State, recorded in the
“ proper county, and after record delivered to the com-
“ missioners of the land office as a part of their archives.

“ **Section 293. PROCEEDS OF LANDS SOLD AND PAYMENT
“ FOR LANDS PURCHASED.** The proceeds of lands sold
“ prior to January first, eighteen hundred and ninety-five,
“ and paid to the State treasurer shall be held by him as
“ a separate fund and special deposit at all times available
“ for the purchase of other lands under this article. Pay-
“ ment for such purchases and for expenses necessarily

“ incurred by the board in the preliminary examinations
“ of lands purchased under authority of this article, or
“ in the examination of titles of lands so purchased, or
“ otherwise necessarily incidental to such purchases, may
“ be made from such fund or from any moneys appro-
“ priated therefor on the certificate of the commission and
“ audit of the comptroller.

“ **Section 294. REVENUES FROM LEASES MADE PRIOR TO
“ JANUARY FIRST, EIGHTEEN HUNDRED AND NINETY-FIVE.**
“ All revenues received from leases of State lands made
“ made prior to January first, eighteen hundred and
“ ninety-five, shall be paid into the State treasury, and
“ shall be placed to the credit of the special fund estab-
“ lished for the purchase of lands within the Adirondack
“ park.

“ **Section 295. ANNUAL REPORT.** The board of fisheries,
“ game and forest shall include in its annual report an
“ account of its proceedings with reference to the park,
“ including a statement of the number of acres of land
“ purchased during the year, the locality thereof, the
“ price paid, the revenue from leases made prior to
“ January first, eighteen hundred and ninety-five, and all
“ other information of importance connected with such
“ transactions; and shall state the amount of money re-
“ quired in the next fiscal year for the purchase of lands
“ and expenses of the park, and make such recommenda-
“ tions with reference thereto as it deems wise.

“ **Section 4. Article twelve of the game law, being
“ chapter four hundred and eighty-eight of the laws of
“ eighteen hundred and ninety-two, is hereby made
“ article fourteen, and sections two hundred and seventy
“ and two hundred and seventy-nine, inclusive, are here-
“ by renumbered three hundred to three hundred and
“ nine, respectively.**

“ Section 5. Chapter three hundred and thirty-two of
“ the laws of eighteen hundred and ninety three, chapters
“ four hundred and thirty-nine and six hundred and
“ sixty-five of the laws of eighteen hundred and ninety-
“ four are hereby repealed.”

“ Chapter 561. Laws of 1895.

“ AN ACT to authorize the forest commission to pur-
“ chase lands within the boundaries of the forest preserve.

“ Became a law May 8, 1895, with the approval of the
“ Governor. Passed, three-fifths being present.

“ *The People of the State of New York, represented in
Senate and Assembly, do enact as follows:*

“ Section 1. Pursuant to its recommendation and reso-
“ lution, transmitted to the legislature February fifth,
“ eighteen hundred and ninety-five, the forest commission,
“ or such department of the State government as may
“ hereafter be charged with the care of the forest preserve
“ is authorized, with the approval of the commissioners of
“ the land office, to purchase, for the uses and purposes of
“ the Adirondack park, the whole or any portion of any
“ township or great lot within the boundaries of the forest
“ preserve, the owners of which have sustained damage by
“ the construction of reservoirs by the State for canal pur-
“ poses, or to restore waters taken for the canals, not ex-
“ ceeding in all eighty thousand acres, at a reasonable and
“ fair valuation, taking into account the damages neces-
“ sarily sustained by any such owner in consequence of
“ such acts of the State in constructing and maintaining
“ such reservoirs, but every such purchase shall be upon
“ the express condition stated in the contract of purchase,
“ that the land owner from whom the purchase is made,
“ shall release to the state all claims for damages to lands
“ not purchased, and owned and retained by him.

“ Section 2. The treasurer shall pay, on the warrant of
 “ the comptroller, from the moneys now in the hands of
 “ the treasurer of the State to the credit of the forest com-
 “ mission, and known as the forest preserve fund, the sum
 “ of fifty thousand dollars, or so much thereof as may be
 “ necessary, and said sum is hereby appropriated for the
 “ purposes of this act, and the forest commission is author-
 “ ized to provide for the payment of the residue of such
 “ purchase price in ten equal installments with interest,
 “ at the rate of three per centum per annum, payable
 “ semi-annually.

“ Section 3. This act shall take effect immediately.

4. *Canal Laws.*

CHAP. CCLXII.

“ AN ACT respecting navigable communications between
 “ the great western and northern lakes and the Atlantic
 “ ocean.

“ Passed April 15, 1817.

“ WHEREAS navigable communications between lakes
 “ Erie and Champlain, and the Atlantic ocean, by means
 “ of canals connected with the Hudson river, will pro-
 “ mote agriculture, manufactures and commerce, mitigate
 “ the calamities of war, and enhance the blessings of
 “ peace, consolidate the union, and advance the pros-
 “ perity and elevate the character of the United States:
 “ AND WHEREAS it is the incumbent duty of the people
 “ of this state to avail themselves of the means which the
 “ Almighty has placed in their hands for the production
 “ of such signal, extensive and lasting benefits to the
 “ human race:”

“ II. AND BE IT FURTHER ENACTED, That the commis-
 “ sioners appointed by the act, entitled ‘an act to pro-

“ ‘ vide for the improvement of the internal navigation of
“ ‘ this state,’ passed April 17, 1816, shall continue to
“ possess the powers thereby conferred, and be denomi-
“ nated ‘ the canal commissioners; ’ and they are hereby
“ authorized and empowered, in behalf of this state, and
“ on the credit of the fund herein pledged, to commence
“ making the said canals, by opening communications
“ by canals and locks between the Mohawk and Seneca
“ rivers, and between Lake Champlain and the Hudson
“ river; to receive from time to time from the commis-
“ sioners of the canal fund, such monies as may be neces-
“ sary for and applicable to the objects hereby contem-
“ plated; to cause the same to be expended in the most
“ prudent and economical manner, in all such works as
“ may be proper to make the said canals; and on com-
“ pleting any part or parts of the works or canals con-
“ templated by this act, to establish reasonable tolls and
“ adopt all measures necessary for the collection and pay-
“ ment thereof to the commissioners of the canal fund;
“ that a majority of the said commissioners shall be a
“ board for the transaction of business, each of whom
“ shall take an oath well and faithfully to execute the
“ duties of his office, and shall report to the legislature
“ at each session thereof, the state of said works and
“ expenditures, and recommend such measures as they
“ may think advisable for the accomplishment of the
“ objects intended by this act; and in case of any vacancy
“ in the office of commissioner, during the recess of the
“ legislature, the person administering the government
“ may appoint a person to fill such vacancy until the
“ legislature shall act in the premises.

“ **III. AND BE IT FURTHER ENACTED**, That it shall and
“ may be lawful for the said canal commissioners, and
“ each of them, by themselves and by any and every
“ superintendent, agent and engineer employed by them,

“ to enter upon, take possession of, and use all and singular any lands, waters and streams necessary for the prosecution of the improvements intended by this act, and to make all such canals, feeders, dykes, lock, dams and other works and devices as they may think proper for making said improvements, doing, nevertheless, no unnecessary damage; and that in case any lands, waters, or streams, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to the people of this state, it shall be the duty of the canal commissioners, from time to time, and as often as they think reasonable and proper, to cause application to be made to the justices of the supreme court, or any two of them, for the appointment of appraisers; and the said justices shall thereupon, by writing, appoint not less than three nor more than five discreet, disinterested persons as appraisers, who shall, before they enter upon the duties of their appointment, severally take and subscribe an oath, or affirmation, before some person authorized to administer oaths, faithfully and impartially to perform the trust and duties required of them by this act; which oath or affirmation shall be filed with the secretary of the canal commissioners; and it shall be the duty of the said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss and damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises, so required for the purposes aforesaid, by and in consequence of making and constructing any of the works aforesaid; and the said appraisers, or a majority of them, shall make regular entries of their determination and appraisal, with an apt and sufficient description of the several premises appropriated for the purposes aforesaid, in a book or books to be provided and kept by the canal

“ commissioners, and certify and sign their names to such
“ entries and appraisal, and in like manner certify their
“ determination as to those several premises which will
“ suffer no damages, or will be benefitted more than in-
“ jured by or in consequence of the works aforesaid ; and
“ the canal commissioners shall pay the damages so to be
“ assessed and appraised, and the fee simple of the prem-
“ ises, so appropriated, shall be vested in the people of
“ this state.

“ IV. AND BE IT FURTHER ENACTED, That whenever,
“ in the opinion of the canal commissioners, it shall be for
“ the interest of this state, for the prosecution of the works
“ contemplated by this act, that all the interest and title
“ (if any) in law and equity, of the Western inland lock
“ navigation company, should be vested in the people of this
“ state, it shall be lawful for the said canal commissioners
“ to pass a resolution to that effect ; and that it shall then
“ be lawful for the president of the canal commissioners
“ to cause a copy of such resolution, with a notice signed
“ by himself and the secretary of the said commissioners,
“ to be delivered to the president or other known officer
“ of said company, notifying the president and directors
“ of the said company, that an application will be made
“ to the justices of the supreme court, at a term thereof
“ to be held not less than thirty days from the time of
“ giving such notice, for the appointment of appraisers
“ to estimate the damages to be sustained by the said
“ company, by investing in the people of this state, all
“ the lands, waters, canals, locks, feeders and appurte-
“ nances thereto acquired, used and claimed by the said
“ company, under its act of incorporation, and the sev-
“ eral acts amending the same ; and it shall be the duty
“ of the justices aforesaid, at the term mentioned in the
“ said notice, and on proof of the service thereof to
“ appoint by writing, under the seal of the said court and

" the hands of at least three of the said justices, not less
 " than three, nor more than five, disinterested persons,
 " being citizens of the United States, to estimate and
 " appraise the damages aforesaid; and it shall be the duty
 " of the said appraisers, or a majority of them, to esti-
 " mate and appraise the damages aforesaid, and severally
 " to certify the same, under oath, before an officer
 " authorized to take the acknowledgment of deeds, to be
 " a just, equitable and impartial appraisal, to the best of
 " their judgment and belief, and shall thereupon deliver
 " the same to one of the canal commissioners, who shall
 " report the same to the said court; and if the said court
 " shall be of opinion, that the said damages have been
 " fairly and equitably assessed, the said justices, or any
 " three of them, may certify the same on the said report;
 " and the amount of the said damages, and the expense
 " of the said appraisal, shall be audited by the comptroller,
 " and paid, on his warrant, by the treasurer, out of the
 " canal fund; and the people of this state shall there-
 " upon be invested with, and the said canal commissioners
 " may cause to be used, all the lands, waters, streams,
 " canals, locks, feeders and appurtenances aforesaid, for
 " the purposes intended by this act.

" CHAP. CCII.

" AN ACT for the maintenance and protection of the
 " Erie and Champlain Canals, and the Works connected
 " therewith.

" Passed April 13, 1820.

* * * * *

" III. BE IT FURTHER ENACTED, That for the speedy
 " reparation of such injury, that whenever, and as often
 " as such case shall happen, it shall be lawful for the
 " said commissioners, or either of them, or of their en-

“ gineers, or any other person employed by either of them
“ with carts, waggons or other carriages, with their beasts
“ of draft or burthen, and all necessary tools and imple-
“ ments, to enter upon any lands contiguous to the said
“ canals, or the works connected therewith, and to dig
“ for, work, get and carry away, and use, all such stone,
“ gravel, clay, timber, and other materials as may be
“ necessary or proper, in their opinion, for such repara-
“ tion, doing as little damage thereby as the nature of the
“ case will permit. And in case damages shall be claimed
“ by the owner or owners of any land entered upon for the
“ purpose of obtaining materials as aforesaid, and the said
“ commissioners, or either of them, or the principal en-
“ gineer of that portion of either of the said canals, where
“ such injury may have occurred, cannot agree with such
“ owner or owners as to the amount of said damages, then,
“ for the purpose of ascertaining that amount, it shall be
“ lawful for either of the said acting commissioners, or for
“ such engineer, to select one discreet freeholder of the
“ county wherein such damages may be claimed, and such
“ owner or owners, another, and these two freeholders
“ shall select a third, which three, after being severally
“ sworn before any person authorized to administer oaths,
“ faithfully and impartially to assess said damages, shall
“ proceed to enquire into said damages, and after having
“ ascertained the same by the concurrent opinion of any
“ two or all of the said freeholders, they shall certify the
“ same in writing, under their hands and seals, or the
“ hands and seals of any two of them; and the amount of
“ damages thus certified, shall be paid to such owner or
“ owners, by the said commissioners, within ten days after
“ said certificate shall be delivered to them, or as soon
“ thereafter as they shall be in funds; and proof of such
“ payment or of the offer of such payment, in case of re-
“ fusal to receive the same on the part of such owner or

“ owners, shall forever discharge the said commissioners
 “ and their engineers, and all persons employed by them,
 “ from all claims for entering upon such land, and taking
 “ and using materials as aforesaid ; and in case the amount
 “ of damages certified by said freeholders, in any case,
 “ shall fall short of the sum offered for such damages by
 “ said commissioners or engineer, previously to the selec-
 “ tion of said freeholders, then the cost of all proceedings
 “ after such offer, shall be deducted from the amount of
 “ damages so certified, and said commissioners shall be
 “ required to pay to said owner or owners, no more than
 “ the residue of said damages after the deduction of such
 “ cost ; but in case the amount of damages so certified,
 “ shall exceed such previous offer, then all such cost shall
 “ be paid by said commissioners over and above the dam-
 “ ages so certified ; and the said freeholders shall each be
 “ entitled for his services to the sum of one dollar and
 “ fifty cents, for each assessment of damages ; and if more
 “ days than one are required to ascertain and assess said
 “ damages, then each of said freeholders shall be entitled
 “ to one dollar and fifty cents per day, for every day thus
 “ required.”

“ REVISED STATUTES (1830).

“ Part 1, Chap. 9, Title 9, Art. 2.

“ Section 16. In the construction of every canal of
 “ which the construction is or shall be authorized by
 “ law, the canal commissioners shall have power, and it
 “ shall be their duty, to make all such canals, feeders,
 “ locks, dams, aqueducts, and other works, as they shall
 “ deem the proper construction of such canal to require ;
 “ and they shall enter on, and take possession of, and
 “ use, all lands, streams and waters, the appropriation of
 “ which, for the use of such canals and works, shall, in
 “ their judgment, be necessary.

“Section 17. Whenever, in the opinion of the canal commissioners, it shall become necessary or expedient, to make any extraordinary repairs or improvements on any completed canal, such as the opening of new feeders, or the constructions of additional locks, dams, embankments, tunnels or aqueducts, it shall be their duty to cause the necessary surveys and levels to be taken, and accurate drafts, plans and models, or maps, as the case may require, of the contemplated works, together with an estimate, in minute detail, of the probable expense to be incurred, and to submit the same to the canal board for their approbation.

“Section 18. If such extraordinary repairs or improvements shall be directed by the board or the legislature, it shall be the duty of the commissioners to proceed, as soon as circumstances will permit, to execute and complete the same; and for that purpose, by themselves or their agents, to take possession of, and use, all lands, waters or streams of which the occupation and use, in their judgment, may be necessary to enable them to discharge such duties.

“Section 19. Whenever for the purpose of constructing a canal, or making any extraordinary repairs or improvements, it shall be deemed necessary by the canal commissioners having charge of the work, to discontinue or alter any part of a public road, on account of its interference with the proper location or construction of such work, he shall make, or direct to be made, such discontinuance or alteration.”

“Part 1, Chap. 9, Title 9, Art. 3.

“Section 45. There shall continue to be appointed two officers, by the name of canal appraisers, who being associated with any acting canal commissioner, shall be the appraisers of damages, in the cases hereinafter speci-

“fied. The oath or affirmation of office, taken by the
“canal appraisers, shall be filed in the office of the secre-
“tary of state.

“Section 46. When any lands, waters or streams,
“appropriated by the canal commissioners, to the use of
“the public, shall not be given or granted to the state, it
“shall be the duty of the appraisers to make a just and
“equitable estimate and appraisement of the damages,
“and benefits, resulting to the persons interested in the
“premises so appropriated, from the construction of the
“work, for the purpose of making which, such premises
“shall have been taken.

“Section 47. It shall be their duty, for that purpose,
“to meet at such times and places as they may deem
“necessary, and as nearly in the vicinity of the premises,
“as conveniently may be, and hear such proper and
“relevant evidence as shall be offered; and they are for
“that purpose, empowered to administer oaths to wit-
“nesses.*

“Section 48. Every person interested in premises so
“appropriated, if he intend to make any claim for dam-
“ages shall, within one year after such premises shall
“have been taken for the use of the state, exhibit to the
“appraisers a statement of his claim, in writing, signed
“by himself, his guardian or agent, and specifying the
“nature and extent of his interest in the premises appro-
“priated, and the amount of damages; and every person
“refusing or neglecting to exhibit such claim, within the
“time prescribed, shall be deemed to have surrendered
“to the state his interest in the premises so appropriated.

“Section 49. No claim for damages, for premises that
“shall have been appropriated to the use of a canal at
“any time before this chapter shall be in force, shall be

* “ Sec. 1 and 2 of ch. 368, of Laws of 1829, contain provisions incon-
“sistent with this section, and probably repeal it.”

“ received by the appraisers, unless it shall be exhibited
 “ within one year after this chapter shall become a law;
 “ and the premises so appropriated shall be deemed the
 “ property of the state; and no claims, other than those so
 “ exhibited, shall be paid without the special direction of
 “ the legislature.”

“ CHAP. 274.

“ AN ACT in relation to the Erie canal.

Passed May 11th, 1835.

“ *The People of the State of New York, represented
 in Senate and Assembly, do enact as follows :*

“ Section 1. The canal commissioners are hereby
 “ authorized and directed to enlarge and improve the Erie
 “ canal, and construct a double set of lift locks therein,
 “ as soon as the canal board may be of the opinion that
 “ the public interest requires such improvement.

“ Section 2. The dimensions to which the canal and
 “ locks shall be enlarged shall be determined by the canal
 “ board.

“ Section 3. In passing cities or villages and at other
 “ places, an independent canal may be constructed in-
 “ stead of enlarging the present works, if the canal board
 “ shall decide that the public interests will be thereby
 “ promoted. In all cases regard shall be had in the loca-
 “ tion, to the relinquishment of damages, and to gifts,
 “ grants and donations; but nothing in this section shall
 “ authorize the board to abandon the present canal
 “ through cities or villages, where an independent canal
 “ may be deemed advisable.

“ Section 4. It shall be the duty of the canal commis-
 “ sioners to alter and arrange the present feeders, and to
 “ construct such additional feeders and other works as

“they may deem necessary for supplying the enlarged
“canal with water.

“Section 5. In the construction of the several works
“authorized by this act, the canal commissioners shall
“have and exercise all the powers and privileges granted
“to them by the ninth title of chapter ninth of the first
“part of the Revised Statutes; and the said ninth title,
“so far as it may be applicable, shall apply to the works
“hereby authorized.

“Section 6. The cost of constructing, completing and
“maintaining the works authorized by this act shall be
“paid by the commissioners of the canal fund, out of
“any moneys which may be on hand belonging to the
“Erie and Champlain canal fund; but the accounts and
“expenditures under this act shall be kept separate and
“distinct from the accounts and expenditures for the
“ordinary repair and maintenance of the Erie canal.

“Section 7. The eighth section of the act entitled ‘An
“‘Act to provide for the improvement of the canals of this
“‘state,’ passed May 6th, 1834, is hereby repealed.

“Section 8. The commissioners shall report to the
“legislature their proceedings under this act within thirty
“days after the commencement of each session.

“Section 9. After the year one thousand eight hun-
“dred and thirty-seven, the expenditures by virtue of
“this act shall be so limited as to leave from the canal
“revenues, without reference to auction and salt duties,
“an annual income to the state of at least three hun-
“dred thousand dollars over and above all ordinary re-
“pairs and expenditures on the Erie and Champlain canals.

“Section 10. No further expenditures shall be made
“pursuant to the provisions of this act, than are neces-
“sary to construct the additional locks and works con-
“nected therewith, to enlarge the canal in the vicinity
“of said locks, so far as may be necessary to facilitate

“ the passage of boats through the same, and for the purchase of such lands and the extinguishment of such claims for damages, as the commissioners may deem it expedient to secure and extinguish, until a sufficient sum shall have been collected and invested from the canal revenues fully to discharge the Erie and Champlain canal debt.

“ Section 11. This act shall take effect on the passage thereof.”

5. *Certain early acts.*

It was said upon the argument in *Beekman v. Saratoga and Schenectady Railroad Company*, 3 Paige, 45, 60,—the first case where the license to a railroad company to use the right of eminent domain was in question,—that the legislature of New York had then (1831) incorporated about fifteen hundred turnpike, bridge and canal, companies, with the license to take private property.

“ Chap. 29.” (Laws 1778.)

“ AN ACT for regulating impresses of forage and carriages and for billeting troops within this State.

“ Passed 2d. of April, 1778.

“ *Be it enacted by the People of the State of New York represented in Senate and Assembly, and it is hereby enacted by the authority of the same.* That from and after the publication of this act no impresses of forage (under which term is comprehended hay, straw, barley, rye, oats, indian corn and buckwheat) shall be made in this State by the commissary or deputy commissary of Forage, or by any forage master of the United States; but whenever a sufficient quantity of forage cannot be purchased therein or procured from the neighboring States by the commissary or deputy commissary of forage, or by the forage masters for the use

“ of the army in this State, that then on due proof
“ thereof on oath, and application made to any justice of
“ the peace resident in the town, manor, district or pre-
“ cinct in which such impress is required, it shall and
“ may be lawful for the said justice, and he is hereby
“ required immediately thereupon, by warrant or warrants
“ under his hand, to appoint such and so many discreet
“ and prudent inhabitants of this State, actually resident
“ in the said town, manor, district or precinct, and there-
“ by to authorise and direct him or them, to distrain and
“ take from the inhabitants of the said town, manor,
“ district or precinct the quantity of forage to
“ be specified in the said warrant. *Provided* there
“ shall be so much forage therein over and above what
“ shall on inquiry by such person or persons be found in
“ his or their opinion necessary for the subsistence of the
“ respective families and stock *bona fide* kept by each in-
“ habitant in such town, manor, district or precinct, and
“ to deliver to the commissary or deputy commissary of
“ forage or to the forage-master a certificate in writing of
“ the quantity of forage specifying each article thereof
“ which shall be by the said person or persons so taken
“ and distrained and the name of the inhabitants respect-
“ ively from whom taken, together with the current price
“ thereof. But it shall not be lawful for any commissary
“ or deputy commissary of forage or forage master to re-
“ move the forage so taken from any inhabitant, until
“ such time as a copy of said certificate shall be by him
“ or them delivered to the said inhabitant or his wife or
“ one of his children at years of discretion; *and to the end,*
“ That the said impresses may be made with greater just-
“ ice and impartiality.”

(Same act): “ *Provided always, nevertheless,* That in
“ cases of an incursion of the enemy, whereby a sudden
“ movement of the American army or armies within this

“ State may be necessary, and the urgency of the occasion shall not admit of the delays incident to the due execution of this act, it shall and may be lawful for the general or commander of such army or armies respectively, by warrant under his or their hand respectively, to impress a necessary supply of forage *pro hac vice* within this State any thing in this act to the contrary thereof in any wise notwithstanding.”

(Same act): “ *And be it further enacted by the authority aforesaid*, That no impress of teams, horses or carriages, or drivers for the same shall be here after made within this State, on any pretence whatever without warrant from a justice of the peace for that purpose first had and obtained.

“ *And be it further enacted by the authority aforesaid*, That whenever the public service shall require a greater number of teams, horses and carriages, with drivers for the same, that can be supplied by the quartermaster of any part of the army within this State, it shall and may be lawful for any one of the justices of the peace (on proof thereof, and application as aforesaid) resident in the city, town, manor, district or precinct, in which such impress is required, to grant his warrant under his hand and seal, directed to any of the constables within the said city, town, manor, district or precinct, for the impressing of such number of teams, horses and carriages with drivers for the same, as the public service shall then in the judgment of the said justice, actually necessarily require, to be furnished by the said city, town, manor, district or precinct, in addition to the teams, horses and carriages then supplied by the said quartermaster: and which said warrant shall contain the names of the several persons who in the judgment of the said justice (having due respect to the estate and ability of each respective person, and the number of

“ days or times their respective teams, horses or carriages
 “ shall previous thereto have been impressed or have been
 “ in the service) ought to furnish teams, horses or car-
 “ riages with drivers, and the number of teams, horses,
 “ carriages or drivers, to be furnished by each respective
 “ person, and the number of days for which the same shall
 “ be retained in service, or the distance to which each
 “ respective team, horse or carriage shall be compelled to
 “ go; and the said constable shall be allowed the sum of
 “ two shillings for each team he shall procure in con-
 “ sequence of such warrant, for his fees and services, to
 “ be paid by the officer or other person requiring such
 “ impress to be made.

“ *And be it further enacted by the authority afore-
 “ said,* That on performance of the service or services so
 “ to be performed by the said impressed teams, horses,
 “ carriages and drivers, the quartermaster or other officer
 “ attending and requiring the said service, shall either
 “ immediately pay to the owners or drivers of the teams,
 “ horses and carriages so impressed, according to the com-
 “ mon usual and then accustomed rate or fare allowed
 “ for the like services, or otherwise satisfy the said
 “ owners of or drivers for such services, so performed.”

“ Chap. 32.” (Laws 1779).

“ An Act to amend an act for regulating impresses of
 “ forage and carriages and for billeting troops within this
 “ State.

“ Passed the 12th of March, 1779.

“ WHEREAS, no effectual provision is made in the said
 “ act in cases where persons shall suffer their teams or
 “ carriages to be out of repair with intent to prevent them
 “ from being impressed in the public service.

“ *Be it enacted by the People of the State of New
 “ York represented in Senate and Assembly and it is*

“ hereby enacted by the authority of the same, That where any of the carriages to be impressed, the tackling and necessaries thereto shall be defective through the negligence, or default of the owner it shall and may be lawful for the person upon whose application the impress shall be made immediately to have the same repaired in the best manner he can, and to sue such owner before any justice of the peace, within the town manor district or precinct wherein such owner shall reside, and if there shall be no justice of the peace in such town manor precinct or district, then before the nearest justice of the peace for the amount of the expence thereof, and the said justice is hereby directed to give judgment for the said person for the said sum as he shall prove to have expended to compleat the said carriage and team with costs of suit and a reasonable allowance to the said person for his trouble in procuring the same.”

“ (Same act.) And whereas in any by the said act the justices of the peace are not authorized to grant a warrant for impressing teams unless proof shall be previously made, that the public service requires a greater number of teams, horses and carriages, with drivers for the same than can be supplied by the quarter master of any part of the army within this State. And whereas, the obtaining such proof is frequently attended with delay injurious to the public service.

“ Be it therefore enacted by the authority aforesaid, That it shall be lawful for the justices of the peace respectively, to dispense with such proof and in their discretion to grant warrants for impressing teams, carriages, horses and drivers whenever upon application they shall respectively conceive the public service to require the same, anything in the said act to the contrary notwithstanding.”

"Chap. 67" (Laws 1780.)

"That it shall and may be lawful to and for the person
 "administering the government of this State for the time
 "being, from time to time and whenever he shall deem
 "the emergency and occasion to require the same, to grant
 "warrants of impress, under his hand, to any officers and
 "persons, for impressing teams, carriages, horses, oxen
 "and drivers, boats, vessels, materials, provisions and
 "other necessaries for the use and service of the army,
 "in such manner as he shall deem expedient and neces-
 "sary," * * * "That the officer or person making
 "such impress shall give to the person from whom any
 "of the matters or articles aforesaid shall be impressed, a
 "certificate thereof, and that each and every person from
 "whom any of the matters or articles aforesaid, shall be
 "impressed, shall be entitled to receive from the public
 "officer authorized to pay the same, the current price for
 "the articles or matters impressed, or for the use or hire
 "thereof, as the case may be."

"Chap. 31" (Laws 1779.)

"11. *Be it further enacted by the authority afore-
 said,* That the commissioners or the major part of them,
 "in their respective towns manors, districts or pre-
 "cincts, for which they shall be chosen commissioners,
 "are hereby empowered and authorized to regulate the
 "roads already laid out, and if any of them shall appear
 "inconvenient and an alteration necessary, and the same
 "be certified upon oath by twelve principal freeholders of
 "such of the said counties, wherein the alteration may be
 "required, to alter the same in such manner as a majority
 "of commissioners in such town manor district or precinct
 "shall judge meet and convenient; and also to lay out
 "such other public highways and roads, as they or the
 "major part of them, shall judge necessary, as well for

“travellers as for the inhabitants of each town manor
“district or precinct.

“Provided, nevertheless, That where any roads shall
“be laid out through inclosed or improved lands, the
“owner or owners shall be paid the true value of the
“land, so to be laid out into an highway or road with
“damages as he, she or they may sustain by reason
“thereof, in manner following, viz.

“The value of the said land, and the amount the damages
“the owner or owners thereof may sustain as aforesaid, shall
“be determined, and the true value set and appraised by
“two justices of the peace, and by the oaths of twelve
“principal freeholders, not having an interest in the land
“so to be laid out into an highway or road, and the said
“freeholders shall be summoned by any constable of the
“town manor district or precinct in which such road or
“highway shall be laid out as aforesaid, by virtue of a
“warrant to be issued by the said two justices of the
“peace for that purpose;” * * *

“Provided always, That no road or highway shall be
“laid through any orchard or garden, without the con-
“sent of the owner or owners thereof, any thing herein
“contained, notwithstanding.

“Chap. 40” (Laws 1792.)

“AN ACT for establishing and opening lock navigations
“within this State.

“Passed the 30th. of March 1792.

“WHEREAS a communication by water, between the
“southern northern and western parts of this State will
“encourage agriculture, promote commerce, and facilitate
“a general intercourse between the citizens. Therefore ”
“*And be it further enacted by the authority aforesaid,*
“That each of the said corporations, by president and
“directors, or by any agent, superintendent, engineer or

“ other person employed in the service of such corpora-
“ tion may enter into and upon all and singular the land,
“ and lands covered with water where they shall deem it
“ proper to carry the canals and navigation herein before
“ particularly assigned to each of the said corporations,
“ and to lay out and survey such route and tracts as shall
“ be most practicable for effecting navigable canals as
“ aforesaid by means of locks and other devices, doing
“ nevertheless as little damage as possible to the grounds
“ and inclosures in and over which they shall pass, and
“ thereupon it shall and may be lawful to and for the said
“ president and directors respectively, to contract and
“ agree with the owners of any lands and tenements for
“ the purchase of so much thereof as shall be necessary
“ for the purpose of making, digging and perfecting the
“ said canals, and for erecting and establishing all the
“ necessary locks, works, and devices to such navigation
“ belonging, if they can agree with such owners, but in
“ case of disagreement, or in case the owner thereof shall be
“ feme covert, under age, non compos mentis, or out of
“ the State, then it shall and may be lawful to and for the
“ said president and directors to apply to the chancellor
“ of this State, who upon such application is hereby au-
“ thorized and empowered, enjoined and required to frame
“ and issue one or more writ or writs as occasion shall re-
“ quire, in the nature of a writ of ad quod damnum, to
“ be directed to the sheriff of the county in which such
“ lands and tenements shall be, commanding him that by
“ the oaths of twelve good and lawful men of his baili-
“ wick, who shall be indifferent to the parties, he shall
“ enquire, whether the person or persons owning any
“ lands and tenements necessary to be used by the said
“ president and directors, or which shall be injured in
“ establishing the said canals and navigation, which per-
“ son or persons shall be named, and which lands and

“ tenements shall be described in such writ or writs which
“ will suffer and sustain any, and what damages by rea-
“ son or means of taking any lands, tenements, mill, mill-
“ pond, water, water-course, or other real hereditaments
“ necessary for the use of the said canals and navigation
“ and the works and locks thereto belonging, and to re-
“ turn the same writ, together with the finding of the said
“ jury, to the court of chancery of this State without de-
“ lay after such finding; and upon such writ being de-
“ livered to the said sheriff, he shall give at least fourteen
“ days notice in writing to all and every of the owners
“ and occupants of the premises who shall be within his
“ bailiwick, and shall also affix a copy of such notice on
“ the door of the court house or gaol within his bailiwick,
“ and if there is no court house or gaol, then on the door
“ of some noted tavern within the same, of the lands and
“ tenements in the said writ described, of the time of ex-
“ ecuting the same, and shall cause to come upon the
“ premises at the time appointed, twelve good and lawful
“ men of his bailiwick who shall be selected in such man-
“ ner as struck juries usually are, to whom he shall
“ administer an oath, that they will diligently enquire
“ concerning the matters and things in the said writ
“ specified and a true verdict give according to the
“ best of their skill and judgment without favour or
“ partiality, and therenpon the said sheriff and in-
“ quest shall proceed to view all and every the
“ lands and tenements in such writ specified, and
“ having considered the quantity of land, land covered
“ with water, mills, buildings or other improvements that
“ shall be necessary to be vested in the said corporations
“ for the purposes aforesaid, and any watercourse then
“ existing, the use whereof will be necessary for the pur-
“ pose aforesaid, they shall cause the same to be minutely
“ and exactly described by meets and bounds, or other

“ particular descriptions, and shall value and appraise the
“ injury or damages, if any, which the owner or owners
“ of the said lands, tenements, mills, water, watercourses,
“ buildings or improvements will according to their best
“ skill and judgment, sustain and suffer by means of so
“ much of the said lands and tenements being vested in
“ the said corporations, or by means of such improvements
“ being destroyed, or rendered useless or of less value, or
“ by means of the said corporations being permitted to
“ turn such water to fill their canals and locks, or by
“ means of the said corporations being permitted to en-
“ large any millpond, millrace, or other water course, and
“ to use the same as and for part of their said canals and
“ navigation, or by any other means whatsoever, defining
“ and ascertaining as well all such lands and tenements,
“ liberties and privileges so to be vested in either of the
“ said corporations the several sums at which the said in-
“ juries and damages shall be so assessed: And the said
“ sheriff and jury shall make an inquisition, under their
“ hands and seals, distinctly and plainly setting forth all
“ the matters and things aforesaid; and the sheriff shall
“ forthwith return the same together with the said writ
“ to the said court of chancery, and thereupon the chan-
“ cellor shall examine the same, and if the said writ shall
“ appear to have been duly executed, and the return
“ thereof be sufficiently certain to ascertain the lands and
“ tenements, rights, liberties and privileges intended to be
“ vested in the said corporations, and the several compen-
“ sations awarded to the owners thereof, then the said
“ court shall enter judgment that the said corporation
“ paying to the several owners as aforesaid the several
“ sums of money in the said inquisition assessed, or bring-
“ ing the same into the said court, over and besides the
“ costs of such writs and of executing and returning the
“ same, shall be entitled to have and to hold to them and

" their successors and assigns for ever, all and every the
 " lands, tenements, rights, liberties and privileges in the
 " said inquisition described, as fully and effectually, as if
 " the same had been granted to them by the respective
 " owners thereof. And if any of the returns so to be made
 " shall not be sufficiently certain for the purposes afore-
 " said, the said court shall award an inquisition de novo."

This is the first act, so far as I know, where the power to take property by the right of eminent domain was delegated to a corporation. Of course, town and municipal and other public officers had long before used such power, but this is the first where it is given to a business corporation.

Under this act the Western Inland Lock Navigation Company built canals around the Fort Herkimer rapids and the Little Falls of the Mohawk : between the Mohawk and Wood Creek at Fort Stanwix, now Rome, and around the falls of the Seneca River, now Seneca Falls.

When New York built the Grand Canal the property of the Western Inland Lock Navigation Company was all taken by the State. (Chapter 262, Laws 1817, Section 4, ante, p. 99.) The section above quoted was amended by Chapter 101 of the Laws of 1798, so as to read as follows :

" That so much thereof of the seventh section of an act
 " entitled 'An act for establishing and opening lock navi-
 " gation within this State,' as provides for the assess-
 " ment of damages to any owner or proprietor of land
 " therein mentioned, by writ in nature of a writ of ad
 " quod damnum, shall be, and is hereby repealed ; and in
 " place thereof, it shall be the duty of the respective cor-
 " porations, created by the said recited act previously to
 " any appraisement as hereinafter provided, to cause a
 " survey and map to be made of the ground in their esti-
 " mation requisite ; and which they may be by law

“authorised to approximate for the uses, specified
“in the said recited act and the acts amending the
“same; in the field book of which survey and
“map shall be distinguished the land of the several
“owners and occupants, appropriated or intended to be
“appropriated as aforesaid, and the quantity thereof; and
“shall exhibit such field book and map to the justices of
“the Supreme Court or any two of them; and if such
“justices shall be of opinion that the land so surveyed is
“not more than what is requisite for the said uses, and
“may be lawful for the said respective corporations to
“appropriate, they shall certify such field book and map,
“under their hands and seals, and cause the same to be
“filed in the office of the clerk of the county in which the
“same lands, or the greater part thereof may be situated,
“thereto remain as a public record. And it shall thereupon
“be lawful for the said justices, by a writing under hands
“and seals, to appoint not less than three nor more than
“five discreet persons, none of whom shall be interested
“in such corporation, or the lands so surveyed, as afore-
“said, to appraise the premises specified in such field
“book: And it shall be the duty of the appraisers, or a
“majority of such as shall be appointed to examine the
“land of each owner or occupant so appropriated, and to
“ascertain the value thereof, and the damages each may
“sustain by such appropriation; and to make a regular
“entry of such valuation and assessment of damages in a
“book to be by them kept for that purpose, and certify
“the same under oath to be a true, fair and impartial
“valuation and assessment, to the best of their belief; and
“shall thereupon cause such book, the execution of the
“said certificate being first duly proven or acknowledged,
“to be filed in the office of such clerk as aforesaid, there
“to remain as a public record: And the said corporation
“and their successors upon paying to the several owners

“ the sums of money so assessed as aforesaid, together with the costs of appraisement, shall immediately be vested with the fee simple of the lands and tenements mentioned and specified in such field book, filed in the office aforesaid.”

“ *Chap. XVI. (Laws 1797.)*

“ *AN ACT to amend the act entitled ‘An act to prevent the bringing in and spreading of infectious diseases in this State.’*

(p. 26.) “ *And be it further enacted,* That from and after the first day of July next, no person shall dress sheep or lamb skins, or manufacture glue, nor shall any soap boiler or tallow chandler, or starch maker, or maker or dresser of vellum, carry on any of their processes or operations of their said trades, which produce impure air or offensive smells, such as trying or melting of fat or tallow, boiling soap, fermenting grain or other substances for starch, washing, fermenting, or oiling skins for vellum at any place within the city of New York south of the south side of Grant street, and of the south side of said street, continued until it intersects the easterly line of Mulberry street, and south of the west line from the intersection aforesaid, continued to Hudson’s river, under the penalty of one hundred dollars for each offence.”

(p. 26.) “ *And be it further enacted,* That it shall be lawful for the mayor, aldermen and commonalty of the said city of New-York, to treat and agree with such of the owners or proprietors of the manufactories, trades or businesses prohibited as aforesaid, for the taking down, removal and replacing the vessels and fixtures used in such manufactories and trades in such part of the said city in which such manufactures and trades may by this

“ act be established and prosecuted; and in case no agreement can be made with the owners or proprietors of any such manufactoryes or persons prosecuting such trades as aforesaid, then and in such case it shall and may be lawful to and for the said mayor and recorder, and any two or more of the said aldermen by virtue of this act, by a precept under their hands and seals, to command the sheriff of the said city and county of New-York, to impannell and return a jury of twelve freeholders, to appear before the mayor’s court of the said city at any term, not less than three weeks from the date of such precept, to enquire into and ascertain the reasonable compensation which should be made to such owners or proprietors for such taking down, removal and replacing as aforesaid; which said jury being first duly sworn, faithfully and impartially to enquire into and ascertain such compensation, shall proceed to ascertain the same; and the sum found by their verdict shall be paid by the said mayor, aldermen and commonalty of the said city of New-York, to the said owners or proprietors, and shall be deemed as part of the contingent expenses of the said city, to be raised, levied and collected as the other contingent expenses of the said city are levied, collected and paid. *Provided always*, that after such decision by the jury, it shall be optional with the said mayor, aldermen and commonalty either to pay the amount of the compensation found by the jury, or within one month thereafter, at their proper expence to take down, remove and replace such vessels and fixtures in such place as the owners and proprietors thereof shall direct, and in such part of the city as by this act such manufactoryes of trades as aforesaid may be established.”

"Chap. LXXXVII." (Laws 1897.)

"AN ACT for constructing a road and establishing
"and erecting turnpikes between the city of Albany,
"and the town of Schenectady.

"Passed the 1st day of April, 1797.

"WHEREAS a good and sufficient road between the city
"of Albany and the town of Schenectady will manifestly
"tend to the advantage of the citizens of this State.
"Therefore

"Be it enacted by the people of the State of New
"York represented in Senate and Assembly, That there
"shall be established a company of stockholders for the
"purpose of making a good and sufficient road to begin
"etc.

(p. 196) "And be it further enacted, that the said
"corporation by the President and Directors, or by any
"agent, superintendent, artist or other person employed
"in their service may enter into and upon any land where
"they shall deem it proper to construct the said road, and
"to lay out and survey such routs and tracts as shall be
"most practicable for effecting a good and sufficient road
"between the places aforesaid, doing nevertheless as little
"damage as possible to the grounds and inclosures in and
"over which they shall pass, and the said President and
"Directors may contract and agree with the owners of any
"lands and tenements for the purchase of so much there-
"of as shall be necessary for the purpose of making,
"digging and perfecting said road, and for erecting and
"establishing gates, toll houses, and all other works and de-
"vices to such road belonging, if they can agree with such
"owners, but in case of disagreement, or in case the owner
"thereof shall be *feme covert*, under age, *non*
"*compos mentis*, or out of the county, then it

“ shall and may be lawful to and for the said
“ President and Directors to apply to one of the
“ judges of the court of common pleas in and for the city
“ and county of Albany, who upon such application is
“ hereby authorized and empowered and required to frame
“ and issue one or more writ or writs as occasion shall re-
“ quire, in the nature of a writ of *ad quod damnum*, to
“ be directed to the sheriff of the county of Albany,
“ commanding him that by the oath of twelve good
“ and lawful men of his bailiwick, who shall be
“ indifferent to the parties, he shall enquire, whether
“ the person or persons owning any lands and
“ tenements necessary to be used by the said
“ President and Directors, or which shall be injured in
“ establishing the said road and turnpike or turnpikes,
“ which person or persons shall be named, and which
“ lands and tenements shall be described in such writ or
“ writs shall suffer and sustain any, and what damages by
“ reason or means of taking any lands, tenements or other
“ hereditaments necessary for the use of the said road and
“ the works thereto belonging, and to return the same
“ writ, together with the finding of the said jury, to the
“ next court of common pleas held for the said city and
“ county after such finding; and upon such writ being
“ delivered to the said sheriff, he shall give at least four-
“ teen days notice in writing to all and every of the
“ owners and occupants of the premises who shall be
“ within his bailiwick, and shall also affix a copy of
“ such notice on the door of the court house in said
“ county of the lands and tenements in said writ described,
“ of the time of executing the same, and shall cause to
“ come upon the premises at the time appointed, twelve
“ good and lawful men of his bailiwick to whom he shall
“ administer an oath, that they will diligently enquire
“ concerning the matters and things in the said writ

“specified and a true verdict give according to the best
“of their skill and judgment without favour or partial-
“ity, and thereupon the said sheriff and inquest shall
“proceed to view all and every the lands and tenements
“in such writ specified, and shall cause the same to be
“minutely and exactly described by meets and bounds,
“or other particular descriptions, and shall value and ap-
“praise the injury or damages, if any, which the owner
“or owners of the said lands or improvements will ac-
“cording to their best skill and judgment sustain and
“suffer by means of so much of the said lands and
“tenements being vested in the said corporation, and the
“said sheriff and jury shall make an inquisition, under
“their hands and seals, distinctly and plainly, setting
“forth the real damages sustained as aforesaid, and at
“the court of common pleas, then next following the
“sheriff shall return the same, and if the said writ shall
“appear to have been duly executed, and the return
“thereof be sufficiently certain to ascertain the lands and
“improvements, rights, liberties and privileges intended
“to be vested in the said corporation, and the several
“compensations awarded to the owners thereof, then the
“said court shall enter judgment that the said corpor-
“ation paying to the several owners as aforesaid the sev-
“eral sums of money in the said inquisition assessed, or
“bringing the same into the said court, over and besides
“the costs of such writs and of executing and returning
“the same, shall be entitled to have and to hold to them
“and their successors and assigns for ever, all and every
“the lands, improvements, rights, liberties and privileges
“in the said inquisition described, as fully and effectually,
“as if the same had been granted to them by the re-
“spective owners thereof; and if any of the returns so to
“be made shall not be sufficiently certain for the purposes

"aforesaid, the said court shall award an inquisition de
"novo.

This is the first act which incorporated a turnpike company.

It will be observed that the provision for the taking of land is copied almost word for word from the provision in the charter of the Western Inland Lock Navigation Company, which had not then as yet been changed.

Turnpike corporations after this became very numerous, always being created by special act until after 1846, and the above provision was quite immediately changed. The following is a fair specimen of what became the usual provision.

"Chap. LXXIX." (Laws 1800.)

"AN ACT to establish a Turnpike corporation for improving and making a Road from the Town of Salisbury, in the State of Connecticut, to Wattles's Ferry on the Susquehannah river."

(p. 159). "And be it further enacted, That the said corporation, by the president and directors, or by any agent, superintendent, artist or other person employed in their service, may enter into any land where they deem it proper to construct the said road, and to lay out and survey such routes or tracts as shall be most practicable for effecting a good and sufficient road between the places aforesaid; and the said president and directors may contract with the owners of the said land for the purchase of so much thereof as shall be necessary for the purpose of making the said road, and for erecting and establishing gates, toll houses and all other works to the said road belonging, the said president and directors paying the owner or owners, or occupant of the land to be

“ laid out as part of the road, such reasonable sum for damages as may be agreed on: And in case of disagreement between the parties as to the said damages, the same shall be determined by an appraisement, to be made on oath of three; or if they disagree, of two indifferent freeholders, to be mutually chosen, or (if the owners or occupants of the said land refuse or neglect to join in the choice) to be appointed by any judge of the court of common pleas of the county in which the lands or property shall be, provided the said judge shall not be interested in the said dispute.”

6. *The first railroad.*

“Chap. 253.” (Laws 1826.)

“ *AN ACT to incorporate the Mohawk and Hudson Rail Road Company.* ”

“ Passed April 17, 1826.

“ 1. *Be it enacted by the People of the State of New York represented in Senate and Assembly,* “ That Stephen Van Rensselaer and George William Featherstonhaugh, with such other persons as shall associate with them for that purpose, be and are hereby constituted a body politic and corporate, by the name of the Mohawk and Hudson Rail Road Company, for the purpose of constructing a single or double railroad or way betwixt the Mohawk and Hudson Rivers; commencing from the Hudson river at any point within the bounds of the city of Albany, or within half a mile north of the same, and extending to any point in the city of Schenectady, or within half a mile west of the same.”

(p. 287) “ 7. *And be it further enacted,* That the said corporation be, and they hereby are authorised by their agents, surveyors, and engineers, to cause such

“ examinations and surveys to be made, of the ground
“ lying betwixt the Mohawk and Hudson rivers, within
“ the aforesaid limits prescribed by the first section of
“ this act, as shall be necessary to determine the most
“ advantageous route, place or places, for the proper
“ line, course, road and way whereon to construct their
“ single or double rail road or ways: and it shall be law-
“ ful for the said corporation to enter upon and take
“ possession of, and use all such lands and real estate, as
“ may be indispensable for the construction and mainte-
“ nance of their single or double rail road or ways, and
“ the accommodation requisite and appertaining to them:
“ and may also receive, hold and take, all such voluntary
“ grants and donations of land and real estate, as shall
“ be made to the said corporation to aid in the construc-
“ tion, maintenance and accommodation of their single or
“ double rail road or way: *Provided*, That all lands or
“ real estate, thus entered and taken possession of, and
“ used by the said corporation, and which are not dona-
“ tions, shall be purchased by the said corporation of
“ the owner or owners of the same, at a price to be mutually
“ agreed upon betwixt them: and in case of a disagree-
“ ment of the price, it shall be the duty of the governor
“ of this state, upon a notice to be given to him by the
“ said corporation, to appoint three commissioners, of
“ whom, one at least shall be a resident of the county of
“ Albany, and one of the county of Schenectady, who
“ shall be persons not interested in the matters to be
“ determined by them, to determine the damages which
“ the owner or owners of the land or real estate, so entered
“ upon by the said corporation, has or have sustained by
“ the occupation of the same; and upon payment of such
“ damages, together with the costs and charges attending
“ the appraisement by the said corporation, the said com-
“ missioners being allowed each three dollars per day,

“while thus employed; or upon the said corporation
 “depositing in any bank in the city of Albany, the
 “amount of such damages, together with the costs and
 “charges aforesaid, to the credit of the person or persons
 “to whom the commissioners may have awarded them,
 “the proper officers of such bank giving notice to such
 “person or persons, by letter, of such deposit being made
 “by the said corporation; then the said corporation shall
 “be deemed to be seized and possessed of the fee simple
 “of all such land or real estate as shall have been
 “appraised by the said commissioners: and it shall be
 “the duty of the said commissioners, or of a majority of
 “them, to deliver to the said corporation a written state-
 “ment of the award or awards they shall make, with a
 “description of the land or real estate appraised, to be
 “recorded by the said corporation, in the clerk’s office of
 “the county where the land or real estate may lie.”

Construed in

Bloodgood v. The Mohawk and Hudson Railroad Company, 14 W. R. 51; 18 W. R. 9. July, 1835; Oct'r, 1837.

7. The act construed in *Beekman v. Saratoga and Schenectady Railroad Company*, 3 Paige, the FIRST case.

This act—chapter 43 of the laws of 1831—is, so far as the taking of land is concerned, identical with the last act—the charter of the Mohawk and Hudson Rail Road Company, except before the direction to the governor to appoint commissioners, these words are put in—“ and be-
 “ fore the making of any portion of the road on said
 “ land.”

So that the whole clause reads:—

“And in case of a disagreement of price, *and before the*
 “ *making of any portion of the road upon said land*, it
 “ shall be the duty of the governor of this State to ap-

“ point three commissioners, one of whom shall be a resident of the county of Schenectady, and one of the county of Saratoga, who shall be persons not interested in the matters to be determined by them, to determine the damages which the owner or owners of the land or real estate so entered upon by the said corporation, may have sustained, *or shall be likely to sustain*, by the occupation of the same;”

The last words in italics are also not in the former act.

8. *Acts construed in Watson v. New York Central Railroad Company, 47 N. Y., 157.*

“ Chap. 242

“ *AN ACT to provide for the construction of a rail-road from Attica to Buffalo.*

“ Passed May 3, 1836.”

“ *Real estate.* § 7. The corporation is hereby empowered to purchase, receive and hold such real estate as may be necessary for accomplishing the objects for which it is granted; and may, by their agents, surveyors and engineers, enter upon and take possession of and use, all such lands and real estates as may be indispensable for construction and maintenance of their single or double rail-road or way, and the erection of buildings necessary for stationary engines; and may also receive hold and take, all such voluntary grants and donations of land and real estate, for the purpose of said road, as shall be made to the said corporation, to aid in the construction, maintenance and accommodation of the said road; but all lands or real estate thus entered upon, which are not donations, shall be previously purchased by the said corporation of the owner or owners of the same, at a price to be mutually agreed upon between them; and in

“ case of any disability on the part of the *owners* of such,
“ to contract or sell the same, on account of insanity, infancy
“ or otherwise, refusal to sell, or disagreement as to price,
“ and before making any portion of such road on said land
“ the said corporation shall present a petition to the first
“ or senior judge of the county in which such land may
“ lie, setting forth the necessity of such land for the making
“ of such road, and the failure to obtain the same by agree-
“ ment, with the reasons thereof, and the name and resi-
“ dence of each *OWNER*, if known, together with a map,
“ plan, and profile of the road, and praying for the appoint-
“ ment of a jury of appraisers. The said judge shall
“ thereupon direct reasonable notice in writing, to be given
“ to the *OWNERS* of such lands of the time of drawing of
“ such jury, which shall be at the clerk's office in the
“ county where the lands are situate, and upon due proof
“ thereof, and hearing the parties, or such of them as may
“ attend, and object to the regularity of the proceedings
“ on the part of the said corporation, such judge, together
“ with the clerk of said county, shall draw from the grand
“ jury box of the county the names of twelve competent
“ and disinterested jurors, who, by an order to be made
“ by such judge, and entered in the common rule book of
“ the court of common pleas, shall be appointed appraisers
“ *of the damage to be sustained by such owners in the
construction of such road*; and should any person or
“ persons so designated refuse or neglect to serve on said
“ jury, or be disqualified, the vacancy or vacancies shall
“ be filled by said judge in manner aforesaid. Said ap-
“ praisers shall before entering upon the duties of their
“ office take the oath prescribed by the sixth article of the
“ constitution. The said judge shall appoint a time and
“ place for said appraisers to meet, and shall cause due
“ notice in writing to be served upon such *owners*, or, in

“ case of absence, to be left at their usual place of residence,
“ if within the county, and if not, to be put up in some
“ conspicuous place on the premises, of the time and place
“ of meeting for the purpose of completing said appraisement,
“ and shall also cause due notice to be given to the
“ said appraisers of the time and place of meeting, and
“ said appraisers shall at such time proceed to view the
“ premises; they shall have power to examine witnesses
“ under oath, which oath any one of the said appraisers
“ is hereby authorised to administer, and shall, without
“ fear, favor or partiality, *assess the value of the land*
“ *taken, and the damages such OWNERS may sustain by*
“ *the taking of their lands, by injury to buildings, and in*
“ *the construction of such road, without any deduction on*
“ *account of any real or supposed benefit or advantage*
“ *which such OWNERS of such lands may derive by the*
“ *construction of such road.* They shall make an inquisition
“ or certificate of their appraisement, specifying the
“ items appraised, with a map thereof, and shall present
“ the same, with the testimony taken, to the county clerk,
“ who shall file them in his office. The ballots drawn from
“ the jury box shall be replaced by the county clerk.
“ Upon proof to the said judge, within thirty days after
“ the filing of the inquisition of the jury, of payment to
“ the OWNER or OWNERS, or of depositing to THEIR credit
“ in such bank as the judge shall direct of the amount of
“ such appraisement, and of all costs and expenses attending
“ it, including reasonable counsel fees (to be taxed and
“ certified by said judge), the judge shall make an order
“ particularly describing the land, and reciting the appraisement
“ and the mode of making it; which *order*
“ shall be recorded in the office of the clerk of the county
“ in which the land is situated, in like manner as if the
“ same were a deed of conveyance; *and the said corpora-*

*"tion shall thereupon become possessed of such land
"during the continuance of the corporation, and may
"use the same for the purposes of said road."*

The act of 1843 referred to in the opinion of the court (47 N. Y., 161) simply applied to the Buffalo and Attica Railroad Company a provision of section seven of the act of 1836, also referred to in the opinion, which authorized the vice-chancellor of the eighth circuit to increase or lessen the amount of the appraisement.

BRIEF OF THE ARGUMENT.

The plaintiff, in error, claims, as I read its assignments of error, three things:

First.—That it has a contract which gives it the right to build its road to Lake Ontario OR the St. Lawrence River, and take the necessary land by the delegated right of eminent domain—which contract Sovereign New York cannot break.

Secondly.—That by the filing of its map across Township fifteen, and the service of its notices, it has acquired a lien upon the strip of land described in the map—which cannot be taken from it at all, and certainly not without compensation.

The latter branch of this proposition the appellate division of the supreme court of New York held in its favor.

Thirdly.—That chapter 220 of the laws of New York of 1897 does not command proceedings which are due process of law within the meaning of the fourteenth amendment, and is therefore unconstitutional and void.

FIRST.

That it has a contract which gives it the right to build its road to Lake Ontario OR the St. Lawrence River, and take the necessary land by the delegated right of eminent domain—which contract Sovereign New York cannot break.

The plaintiff in error bought in 1882 the railroad of the Adirondack company, which then extended and still ex-

tends from Saratoga Springs to North Creek and no further, and under the reorganization laws of New York (printed *ante*, pp. 20-23) it organized itself with a life of a thousand years.

By the same acts it then and thus acquired all the rights of the Adirondack Company.

That company was organized under the general railroad act of New York in 1863 (R. 71, and see the laws, *ante*, pp. 13-20).

In 1892 the plaintiff in error applied to the railroad commissioners of New York and obtained from them under section 83 of the then railroad law, a certificate, which that law says "shall be irreversible by such board" (*ante*, p. 29), that it need not extend its road beyond North Creek (R. 19; in evidence R. 72; *ante*, pp. 7, 29).

The effect of this is to make its life secure for **NINE HUNDRED AND EIGHTY-THREE YEARS**, *although it builds no more road*—and the claim of course must be that at any time *within the nine hundred and eighty-three years* it can build its road, and no land, no matter how little, can be shielded from being taken by it.

To grasp the full force of this claim it must be understood that the line is not fixed at all, except that one terminus must be North Creek and the other "some point on Lake Ontario or River St. Lawrence" (*ante*, p. 16), which enables it to swing the line around so that the other point of it may vary some *two hundred miles*.

Here then is a fan shaped piece of the earth's surface—the outer arc of which is two hundred miles—and within that enormous territory Sovereign New York cannot put a park, nor cede an acre to the United States for a fort or a lighthouse for *nine hundred and eighty-three years*.

That is the claim.

The Adirondack company came into being by virtue of

the general railroad law of New York in 1863. Since 1830 the Revised Statutes of New York have reserved the right to alter and amend (*ante*, p. 13). Since 1846 the same thing has been in the Constitution (*ante*, p. 12).

And the general railroad law, under which the defendant came into being, reserved the right to "annul or dissolve" the Adirondack Company and the plaintiff in error (*ante*, p. 13).

When, therefore, Sovereign New York, in 1895, speaking through her Constitution, said that the lands in township fifteen should "not be taken by" the plaintiff in error she broke no contract.

Sinking Fund Cases, 99 U. S., 700, 742.

Tomlinson *v.* Jessup, 15 Wall., 454, 457.

People *v.* O'Brien, 111 N. Y., 1, 48.

As much was said below about *The People v. O'Brien*, 111 N. Y. 1, we can perhaps illustrate best by taking the case of the Broadway Surface Railroad Company.

When it was said that The Broadway Surface Railroad Company had the *right* to operate a railroad upon that portion of the earth's surface which was occupied by the street Broadway, *three*, different, things, might have been and in the brief used by the defendant below, as I read it, *were*, meant. *Two* of these were *property*. *The third* was *not* *property*.

When it was said that it had the *FRANCHISE* to operate a railroad upon that portion of the earth's surface which was occupied by the street Broadway, *two* different things might have been, and in the brief used by the defendant below, as I read it, *were*, meant. *One* of these was *property*. *The other* was *not* *property*.

That is to say. There had to be got.

1. From the *owner* of that portion of the earth's surface, if not the *fee*, at least an *easement* to use it for a

railroad. *It so happened* that the title was in the city of New York *in trust for the State*, and that *therefore* the State had to join in the grant. But this was not in the way of its sovereignty. It was simply being in the way of being a *cestui que trust*, like any human being. Such a grant was made.

The State joined in it, it is true, but only because it happened to have an interest in the land. If the grant had been the original grant of Manhattan Island for forty guilders, to Peter Minuits, it would have been as well or better. Here was a simple grant of an easement, property of course, but no *franchise*.

2. But, *it so happened*, that the portion of the earth's surface which was the street Broadway *was a public highway*. A railroad could not therefore be operated upon it without a grant from Sovereign New York in her capacity as a sovereign. Such a grant was made and it was a *FRANCHISE, solely and only because it came from the Sovereign*. And it was also *property*. But it might as well have been made to Peter Minuits, or any other human being; and he, having the easement, could have run the railroad and taken tolls, by virtue of the franchise from Sovereign New York; and all of these things could have passed comfortably to his descendants when he died.

3. But, *it so happened*, that the "easement" and the "franchise" were both granted to the Broadway Surface Railroad Company. Being an artificial being, it could not have used either the "easement" or the "franchise" without a grant to do so from Sovereign New York. Such a grant—of power so to do—it had; but although a franchise because, and *only* because, it came from Sovereign New York, it was *not PROPERTY*; and when Sovereign New York afterwards *killed* the Broadway Surface Railroad Company, that power, *though a franchise*, disap-

peared with the life of the company—though the “easement” and the other “franchise” survived and still survive, and might have gone to any human being—*as in fact they did* for about a year.

In other words a railroad corporation, and *any* artificial being can never be as *complete* a being as an human being. The hand and the arm and the leg and the brain of an human are parts of the being, but they are *not* “property.” So are the personal powers of a railroad company.

SECONDLY.

That by the filing of its map across Township fifteen and the service of its notices it has acquired a lien upon the strip of land described in the map which cannot be taken from it at all, and certainly not without compensation.

I.

The acceptance by the forest preserve board of the offer of McEchron and others, followed by the entry of the State upon the lands, the survey, and the beginning and continuing of the building of the dam, which was to cost a sum so considerable as sixty-seven thousand dollars, before the filing of the map by the railway company, gave to the people of the State an equitable title, good against all later liens.

Dodge *vs.* Gallatin, 130 N. Y., 117, 124-129.

The lands in question were then, and except for the entry by the State, are still "wild," "forest" lands—no portion being under cultivation (R. 17, 69), and the proof by the defendant is that it served its location notices, not upon the *occupants*, as the railroad act requires it to do, but upon the *owners* (R. 17, in evidence R. 72), which is, of course, evidence that there were *no* occupants.

The brief used below by the defendant contained this: (p. 4.) "there being no 'actual occupants' of said lands within the meaning of the statute (fol. 84-85, " 409-410, 389-390.)"

The sort of possession required to make such a contract valid being only the sort of possession usual to that kind of land (*Freeman v. Freeman*, 43 N. Y., 34; *Miller v. Ball*, 64 N. Y., 286; *People v. Turner*, 145 N. Y., 451, 461; the kind of entry made by the State was sufficient.

In *Lowry v. Tew*, 3 Barb. Ch. 407; Chancellor Walworth said: (p. 413.) "Taking possession under a parol " agreement, and in compliance with the provisions of " such agreement, accompanied with other acts which " cannot be recalled so as to place the party taking pos-

"session in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute of frauds."

In this case the State made a *survey* for the dam—the state engineer made his *plans* for the dam—and the *construction* of the dam was begun. The State would not only have lost its money, but the acts themselves could not "be recalled"—and it could not have got its stored water for the Champlain Canal and the navigation of the Hudson if the contract were not enforced.

Potter's Willard's Eq. Jur. 286.

Every one who was concerned in the survey or the work on the dam, down to the meanest, would be liable as a trespasser and could defend only upon a specific performance of the contract, and as Mr. Justice Story said in his work on Equity Jurisprudence (§ 761)—"A man who has 'parted with his money is not in the situation of a man 'against whom an action may be brought, and who may 'otherwise suffer an irreparable injury.' (See also § 763.)

None of the opinions of the courts below pass upon this matter, although it is spoken of (R. 97), but as all facts are found in our favor (R. 97), it is sufficient to sustain the judgment, and the result is that, assuming the right to "alter," "repeal," "annul," and "dissolve," already referred to to exist, *there is no Federal question in the case.*

II.

The plaintiff in error has not any "lien" upon that portion of the earth's surface which is Township fifteen.

The appellate division of the Supreme Court of New York reversed the judgment of the Special Term of that court upon

the ground that by the filing of its maps and nothing having been done for fifteen days the plaintiff in error has got a lien upon the land. It did this upon the authority of the following cases—R. H. & L. R. R. Co. *v.* N. Y. L. E. & W. R. R. Co., 44 Hun, 206, 210, 110 N. Y., 128; Suburban Rapid Transit Co. *v.* Mayor, etc., of N. Y., 128 N. Y., 510; Pocantico Water Works *v.* Bird, 130 N. Y., 249, 256 (fols. 458-462).

These cases are as follows:

R. H. & L. R. R. Co. *v.* N. Y., L. E. & W. R. Co., 110 N. Y. 128 was this—

The plaintiff filed its map of a route alongside of and parallel to the line of defendant's road and over the lands of one Babcock. Babcock attempted to change the line, but his proceeding failed because he did not get his papers served in time. The defendant then leased a piece of Babcock's land *across* the plaintiff's located line, and laid down a track to a brick yard, which the plaintiff took up, and laid down *its* track, which the defendant took up.

The plaintiff thereupon brought two proceedings: 1. A condemnation proceeding against Babcock and the Erie Co., to take the land, in which the petition was made 28th August, 1886, and answered 10th September, 1886 (Appeal Book, fols. 26, 43, vol. 1160, Ct. Appeals Cases, 1886, State Library), and an action against them for an injunction in which the complaint was verified and a temporary injunction issued 21st August, 1886 (Appeal Book, fol. 45, same vol.). Both proceedings came before the same Special Term (Appeal Book, same volume, 1st case, fol. 79; 2d case, fol. 250), before the same General Term (Appeal Book, 1st case, fol. 918; 2d case, 276) and in the Court of Appeals they were argued and decided on the same day (110 N. Y. 119, 128).

In the condemnation proceeding the plaintiff succeeded all through. In the action its injunction was dissolved by

the Special Term; upon its appeal the order was reversed as to the Erie Co., *but affirmed as to Babcock*, the court saying (44 Hun, 214): "As to the defendant Babcock, the injunction was properly dissolved, *as he was owner in fee of the land, and until the plaintiff acquired the right by purchase or otherwise to construct its railroad upon his land, he rightfully remained in possession of the same, and could use and occupy or sell or lease the same without any restraint arising from the location of the road over the premises.*

"The case of the *Corporation of New York v. Mapes* (6 Johns., ch. 46), cited in the opinion of the learned Judge who presided at the Special Term, is in point in sustaining the dissolution of the injunction as to Babcock, but is not, as we can see, an authority vindicating the action of the defendant corporation."

From this order the Erie Co. appealed to the Court of Appeals of New York, where it was affirmed (110 N. Y. 128). The plaintiff did not appeal from the Babcock part of the order.

It is plain that here nothing was decided other than as to which of two railroads should hold a located line, and as far as the general term was concerned, it is an express decision in our favor. A conclusive test of the scope of this decision will be made by supposing Babcock's land to have been the land of the State and within the Adirondack park. The decision of the court upon the injunction would have been the same; but the plaintiff would have failed in the condemnation proceeding.

Suburban Rapid Transit Company v. New York, 128 N. Y., 510, was this:

The plaintiff was made under the rapid transit act of 1875 to make and run a railroad over the piece of land in question in the case. Having made some progress in the construction of its railroad and got much land, but not

this, chapter 522 of the laws of 1884 was enacted, authorizing the city of New York to take the piece of land for St. Mary's Park. Before the city did anything the plaintiff took, by the exercise of the right of eminent domain, the piece of land from the owners of it and went into possession, Appeal Book, fol. 52, vol. 1475, Ct. Appeals Cases, State Library). Some three years afterward (Appeal Book, fols. 51, 57,) the city tried to take the piece of land from the plaintiff, and the court held that it was already in public use, and could not be taken *under that act*.

The *Pocantico* case I claim as an authority in my favor and it will be considered further on.

I.—*The "lien" in question is personal to the defendant—that is to say, the defendant only can enforce the "lien."*

Sovereign New York can kill or maim the defendant—maim it by taking away the power to enforce this particular "lien."

Suppose she does so:—WHAT BECOMES OF THIS "LIEN"?

It is settled, we will say, that Sovereign New York cannot touch the *property* of any being—human or artificial. But as to the *persons* of those beings there is a difference. While Sovereign New York cannot "without due process of law" kill an human being and cannot *maim* an human being at all, she can, at her own will, *kill* or *maim*, as it does *please* her, the artificial beings *of her own creation*.

People v. O'Brien, 111 N. Y. 1, 48.

To illustrate: When the Broadway Surface Railroad Company's articles were filed, it had in its treasury three hundred dollars. Sovereign New York could, as she afterwards did, *kill* the Broadway Surface Railroad Com-

pany, but she could not touch any part of those three hundred dollars.

People *v.* O'Brien, 111 N. Y. 1.

Assuming a franchise to be a branch of the prerogative subsisting in the hands of a subject, or in other words something which the sovereign alone can grant and which it has actually granted, it does not follow that it is *property*. A corporation cannot operate a railroad, even though it owns one, unless the *power* to do so has been conferred upon it by its sovereign—and that *power* is a franchise, but it is a franchise personal to the corporation—a part of its being, like the hand and the brain of an individual human being, and like all the other powers which go to make up the being of a corporation, it will die with the corporation's death, as the hand and the brain of an human being die with that human being's death.

The "lien" can be enforced by no one but the defendant. It is thus *personal* to the defendant only.

St. Peter *v.* Denison, 58 N. Y., 416, 421.

Birdsall *v.* Cary, 66 How. Pr., 358.

It cannot be sold, given away or parted with in any manner.

If either of those dispositions were made of it it would cease to be,—as would the intellect of an human being if enough of his brain were taken to derange him though not enough to kill him,—as the hand of an human being would cease to be a hand, if it were cut from his body.

It is *not* property.

And it follows that it is not A LIEN.

II.—*The exercise of the right of eminent domain consists in the taking of property, not in tying it up for a thousand years, so that while you do not take it yourself, no one else can take it during the thousand years, upon*

the chance that not the sovereign, but a railroad company, may make up its mind to take it during the nine hundred and ninety-nine years.

To illustrate by this case:

The life of the defendant is *one thousand years* from the seventh of July, 1882 (R. 71-72), and its life for the whole of that immense period is made perfectly safe, for the railroad commissioners, on the ninth of May, 1892, *relieved it*, under section 83 of the railroad law *from the obligation of constructing any more of its railroad than is now constructed* (R. 19, in evidence 72).

The owners of Township fifteen are thus placed in this beautiful predicament. The railroad company can discontinue its present condemnation proceedings;

Forster v. Scott, 136 N. Y., 577, 582.

Matter of Washington Park, 56 N. Y., 144, 154.

Matter of Syracuse, B. & N. Y. R.R., 4 Hun, 311.

and the "lien" will then continue for *nine hundred and eighty-three years—twenty-nine generations*.

It is safe to say that nothing like this was ever before claimed for the right of eminent domain. Heretofore when the sovereign has taken property for the public use it has simply "*taken*" it.

The power, not to take it, but to say that nobody else, not even its owner, shall take it or use it, does not exist.

Of course, it can be destroyed, if necessary, as you would destroy a rattlesnake, but that is another matter. There is no question here of its being an injury.

In the days when the sovereign was an human being the exercise of the right of eminent domain was very simple. Her Majesty, the Good Queen Bess *took* what Her MAJESTY wanted; and that Her Majesty did not always *pay* for it, is shown by the provision in the Constitution of New York, that private property shall not be taken for public use

without just compensation (*Beekman v. Saratoga and Schenectady Railroad Co.*, 3 Paige, 45, 57).

When New York built the Grand Canal, her canal commissioners just went and *took* the land and whatever else they wanted for it. *Rogers vs. Bradshaw*, 20 J. R. 735, 738, and unless the "person interested in premises so appropriated" put in a claim to the canal appraisers within a year he was deemed to have *given* his land to the state (1 R. S. Pt. 1, Ch. 9, Tit. 9 §§ 16, 45, 46, 47, 48 and 49; pp. 220, 225-6, *ante*, pp. 102-105), and so stood the law until 1866, and it is substantially so to this day, the former powers to the canal commissioners being now given to the superintendent of public works, and the claims going to the court of claims instead of the canal appraisers (Canal Law; Chap. 338 of 1894; §§ 70, 73, 37.)

See the cases collected in *Birdsall v. Cary*, 66 How. Pr., 358.

The forest preserve act (Chap. 220, Laws 1897, *ante*, p. 31) is, in these respects, a substantial copy of the canal law.

Beginning with the Mohawk and Hudson Rail Road Company, (Chap. 253, Laws 1826, *ante*, p. 127; *Beekman v. Saratoga and Schenectady Railroad Company*, 3 Paige, 45), Sovereign New York, since followed by the rest of the world, has been, somewhat grudgingly and with many safeguards, *licensing* railroad and other corporations to use small details of her sovereign right of eminent domain—and one of the safeguards which she has imposed upon the use of that right, is now claimed to be a *taking* of something.

We submit that the right of eminent domain is exercised only by the *taking* of the *property*.

Pumpelly v. Green Bay Company, 13 Wall., 166, 177-181.

The supposition above made is not overstated except by calling 983 years 1000 years.

Section 83 of the Railroad Law (Chapter 565, Laws 1890; Chapter XXXIX of the General Laws, p. 1107) is as follows (printed *ante*, p. 29):

" § 83. LIABILITIES OF REORGANIZED RAILROAD CORPORATIONS.—A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the state shall certify that in their opinion the public interests under all the circumstances do not require such extension. If such board shall so certify and shall file in their office such certificate, *which certificate shall be irreversible by such board*, such corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate *shall be a bar to any proceedings to compel it to make such extension, or to annul its existence for failure so to do, and SHALL BE FINAL AND CONCLUSIVE IN ALL COURTS AND PROCEEDINGS WHATEVER.* This section shall not authorize the **ABANDONMENT** of any portion of a railroad, which has been constructed or operated or apply to Kings County."

On the ninth of May, 1892, "the Board of Railroad Commissioners," *upon the application of the defendant*, "issued its certificate certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road of the Adirondack Railway Company beyond the portion thereof constructed at the time the said company acquired title to said railroad property and franchises, namely, beyond North Creek, in the county of Warren." (fol. 102; in evidence, fol. 431.)

It is difficult to see why this is not an entire *abandonment* of the franchise beyond North Creek.

III.—*The license to exercise the right of eminent domain cannot be given except by plain, unmistakable words.*

The effect of our structure of government is to lodge the power of giving license to exercise the right of eminent domain in the legislature, exclusively.

Matter of Poughkeepsie Bridge Company,
108 N. Y., 483.

In re N. Y. & H. R.R. Co. v. Kip, 46 N. Y., 546, the court, speaking by Judge Allen, said: (p. 552.)

"They" (such statutes) "are to receive a reasonably strict and guarded construction, and the powers granted will extend no further than *expressly stated*, or than is necessary to accomplish the general scope and purpose of the grant. *If there remains a doubt as to the extent of the power, after all reasonable intenders in its favor, the doubt should be solved adversely to the claim of power.*"

And substantially the same is said in *Matter of Boston and Albany R.R. Co.*, 53 N. Y., 574, 577.

In *Matter of Poughkeepsie Bridge Company*, 108 N. Y., 483, the court, speaking by Judge Andrews, said: (p. 490.)

"In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict, rather than a liberal, construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to delegations of the power by the legislature to private corporations. The motive of the promoters of such corporations is usually private gain, although their creation may subserve a public purpose. When such corporations claim to exercise this delegated power, the rule of strict construction accords with the ordinary rule that delegations of public powers to individuals or private corporations are to be strictly construed in behalf of the public, and by the other principle that private rights are not to be divested except by the clear warrant of law.

But there are not any words in the railroad law to indicate that a railroad company can take the sort of lien in question upon the land of the private owner by the right of eminent domain, or that the filing of the maps, and the expiration of the fifteen days gives it such a lien.

On the contrary there is plenty that it does not.

"§ 4" of the Railroad Law says that the corporation "shall have power," (sub. 2.) "to acquire *by condemnation* such real estate and property as may be necessary "for such construction, maintenance and accommodation "in the manner provided by law, but the real property

"acquired by condemnation shall be held and used only
 "for purposes of the corporation during the continuance
 "of the corporate existence."

Section 3359 of the Code of Civil Procedure is as follows:

"§ 3359. Whenever any person is authorized to acquire title to real property, for a public use, *by condemnation*, the proceeding for that purpose SHALL be taken "in the manner prescribed in this title."

Section 3360 begins as follows:

"§ 3360. The proceeding SHALL be instituted *by the presentation of a petition* by the plaintiff to the Supreme Court setting forth the following fact:"

Section 3371 reads as follows:

"If the report" (of the commissioners) "is confirmed, the court shall enter a *final order* in the proceedings, directing that compensation shall be made to the owners "of the property, pursuant to the determination of the "commissioners, and that *upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment.*"

Here is express legislation that "real property" can be taken, by the right of eminent domain, *only* by the proceedings above described.

Nor does the location section say anything to the contrary. It provides;

"§ 6. LOCATION OF ROUTE.—Every railroad corporation except a street surface railroad corporation and "an elevated railway corporation, *before constructing any part of its road* in any county named in its certificate of "incorporation, or *instituting any proceedings for the condemnation of real property therein*, shall make a map "and profile of the route adopted by it in such county,

"certified by the president and engineer of the corporation, or a majority of the directors, and file it in office of the clerk of the county in which the road is to be made. The corporation shall give written notice to all actual occupants of the lands over which the route of the road is so designated, and which has not been purchased by or given to it, of the time and place such map and profile were filed, and that such route passes over the lands of such occupant. Any such occupant or the owner of the land aggrieved by the proposed location, may, within fifteen days after receiving such notice, give ten days' written notice to such corporation," etc., of an application "for the appointment of commissioners to examine the route." The commissioners may "affirm the route originally designated or adopt the proposed alteration thereof." An appeal may be taken, and on the appeal, the court may affirm the route proposed by the corporation, or may adopt that proposed by the petitioner." *No such corporation shall institute any proceedings for the condemnation of the real property in any county until after the expiration of fifteen days from the service by it of the notice required by this section.*" All this is plainly for the protection of the individual land owner and the public, and not with a view of giving away private property without notice and without compensation.

Ingersoll v. Nassau Electric R.R. Co., 157 N.Y., 543, 563.

(All these laws are printed, *ante*, pp. 23-31).

IV.—*If section six of the railroad law (ante p. 25), by the filing of the map and the expiration of fifteen days makes a lien upon the land, then it is unconstitutional and void, because it takes private property WITHOUT NOTICE, i. e., without due process of law.*

Kentucky Railroad Tax cases, 115 U. S., 331.

V.—*If section six of the railroad law (ante p. 25), by the filing of the map and the expiration of fifteen days makes a lien upon the land, then it is unconstitutional and void, because it takes private property WITHOUT COMPENSATION.*

As has been above shown this lien is to continue for *nine hundred and eighty-three years*. The owner cannot sell the land free from the lien. He cannot build a house upon it and live there with any comfort. *He cannot even pay the lien off.* There is no possible way, short of an act of the legislature, by which it can be got rid of.

Of course if it exist at all it is *property*, *Forster v. Scott*, 136 N. Y., 577; *Ingersoll v. Nassau Electric R.R. Co.*, 157 N. Y., 453, 463, and *property which has been taken from the owner of the land*.

Now, where is the statute which gives him compensation for that taking of property?

There is none.

It is small consolation to him, that *nine hundred and eighty-three years* from now his then descendant, *twenty-ninth in the line of descents from him*, may either get paid for the land by its being taken or get rid of the lien by the end of the defendant's life.

This, of course, comes under the fourteenth amendment.

VI.—*The fifteen days not having expired when the State, but for the injunction, would have acquired the title to Township fifteen and when the deed was actually put in escrow, the route of the defendant has not become located nor has any lien been acquired by it, as against the State.*

1. The defendant filed its map on the *eighteenth of September* (R. 6; admitted R. 32).

On the *first of October—twelve days*—the State was

about to get its deed and pay the money, (Mr. Hibbard's deposition, R. 14; in evidence, R. 72; resolution forest preserve board, R. 5) when the delivery of the deed was stopped by the injunction got by the defendant (R. 8, 60). On the *second* of October—*thirteen* days—the deed was actually put in escrow, (R. 53, 322-324,) and after the injunction was vacated it was delivered (R. 53).

It has since been finally and conclusively adjudged that that injunction should not have been made (R. 61; opinion Appellate Division at end of this brief).

The State is therefore in the same position as if it had got its deed on the first of October—TWELVE days after the filing of the map.

Riggs v. Palmer, 115 N. Y. 506.

The Statute did not mean this (p. 510), and "No one shall be permitted to *** take advantage of his own wrong" (p' 511).

People e. r. Manhattan R. Co. v. Barker,

152 N. Y. 417, 474;

Ansonia B. & C. Co. v. Conner, 103 N.

Y. 502;

Shellington v. Howland, 53 N. Y. 371, 375;

Kingsley v. City of Brooklyn, 78 N. Y. 200, 216;

Hunting v. Blun, 143 N. Y. 511, 514;

United Glass Co. v. Vary, 152 N. Y. 121, 127.

2. It was perfectly well settled under Section 22 of the General Railroad Act (Chap. 140, Laws 1850,) that the filing of the map only *proposed* the location, and that the location was made only by the expiration of the fifteen days or the final determination of the commissioners or the court—and until then the railroad company could not begin proceedings to take land by the right of eminent domain.

In *R. H. & L. R.R. Co. v. N. Y. etc., R.R. Co.*, 110 N. Y. 128, the court, speaking by Judge Gray, said (p. 133):

“ When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, *and has given the required notice to all persons affected by such construction, and NO CHANGE OF ROUTE IS MADE, as the result of any proceedings instituted by any landowner or occupant*, in our judgment, it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations, and free from the interference of any party.

Also— *Matter L. I. R.R. Co.*, 45 N. Y. 364, 365.

People ex r. E. & G. V. R.R. Co., 49 N. Y. 356, 359;

Matter of Washington Park, 56 N. Y. 144, 154.

Wallkill Valley R.R. Co. v. Norton, 12 Abb. Pr. N. S. 317.

N. Y. & Boston R. R. Co. v. Godwin, 12 Abb. Pr. N. S. 21, 21; 62 Barb. 85.

Matter of Niagara Falls R.R. Co., 46 Hun, 94.

In the Pocantico case (130 N. Y. 249,) the Court, speaking by Mr. Justice Haight, said, (p. 256,) in regard to this statute:

“ But in the case of a railroad, the statute provides for the location of its route through the counties which it has to pass, and such location is made known by the map and survey which it places on file. The statute, then, within a specified time, gives to the persons interested the right to institute proceedings to change the location. *If this is not done the road becomes LOCATED at the place indicated upon the map filed, and the com-*

"pany is *thus* given the exclusive right to construct and "operate its road upon such line."

The language of section 22 has been changed somewhat, by its enactment into section 6 of the Railroad Law, but we submit that it does not make any difference.

The changes are thus: the word "intended" is left out from before the word "adopted" in the first sentence. So that whereas section 22 read—"map and pro-
"file of the route *intended to be adopted* by such com-
"pany in such county," section 6 now reads—"map and
"profile of the route *adopted* by it in such county."

But, then, the section, as it stands, calls the line filed by the company the "*proposed* location" all the way through. So that section 6 now reads—"Any such occu-
"pant, or the owner of the land aggrieved by the
"*proposed* location, may, within fifteen days, apply,"
etc.

The justice may appoint commissioners "to examine
"the route *proposed* by the corporation."

On appeal from the commissioners the court "may
"affirm the route *proposed* by the corporation or may
"adopt that *proposed* by the petitioner."

And it has put in at the end this:—"No such corpora-
"shall institute any proceedings for the condemnation of
"real property in any county until after the expiration of
"fifteen days from the service by it of the notice required
"by this section;"—which was not in section 22, although
the courts held, as already stated, that such was the effect
of that section.

The exact text of this part of Section 6 is as follows:

"§ 6 LOCATION OF ROUTE.—Every railroad corporation
"except a street surface railroad corporation and an ele-
"vated railway corporation, before constructing any part
"its road in any county named in its certificate of incor-
"poration, or *instituting any proceedings for the con-*

“demnation of real property therein, shall make a map and profile of the route adopted by it in such county, certified by the president and engineer of the corporation, or a majority of the directors, and file it in the office of the clerk of the county in which the road is to be made. The corporation shall give written notice to all actual occupants of the lands over which the route of the road is so designated, and which has not been purchased by or given to it, of the time and place such map and profile were filed, and that such route passes over the lands of such occupant. Any such occupant or the owner of the land aggrieved by the *proposed* location, may, within fifteen days after receiving such notice, give ten days' written notice to such corporation and to the owners, etc., of an application to a justice of the supreme court, for the appointment of commissioners.

The justice may, upon the hearing of the application, appoint three disinterested persons, one of whom must be a practical civil engineer, commissioners to examine the route *proposed* by the corporation, and the route to which it is proposed to alter the same, etc.

An appeal may be taken, and upon it “the court may affirm the route *proposed* by the corporation or may adopt that *proposed* by the petitioner.”

Italics mine.—The full text of section 6 is given *ante* p. 25.

In the Pocantico case (*Pocantico W. W. Co. v. Bird*, 130 N. Y., 249) the plaintiff, a water works company, had bought lands upon the river with grants of the right to divert its waters from six persons—defendant, another water works company, filed a map for a a dam *above* those premises, so that in order to divert the waters at its proposed dam—it would have had to take the waters thus granted. Plaintiff had not filed any map—the statute in regard to the filing of the map was in these words:—

Section 29, Chap. 415, Laws 1876, is as follows:

“Before entering upon, taking or using any land for the

"purposes of the above recited act, the said company
 "shall cause a survey and map to be made of the lands
 "intended to be taken or entered upon for any of the
 "purposes of the said act, by and on which the land of
 "each owner or occupant shall be designated, which map
 "shall be signed by the president of the said company, and
 "its secretary, and be filed in the office of the county clerk
 "of the county in which the said lands are situated; and
 "the said company by any of their officers, agents and
 "servants, may enter upon any lands for the purpose of
 "making such survey or map."

Here is a plain distinct holding that the filing of the map, *without the expiration of the fifteen days*, will *not* give a lien.

Also, *N. Y. C. v. Aldridge*, 133 N. Y., 83, and
Archibald v. N. Y. C., 157 N. Y., 574.

The location section plainly means that the *owner* shall have *fifteen FULL days*. The time the injunction was in force must, therefore, be taken out (Cases, *ante*, p. 155).

The State, thus, in effect, had the title to the land three days before the defendant COULD have got its lien.

III.

The forest preserve has been made by the State with the deliberate intention of excluding corporations and particularly railroad corporations from it.

It is settled that park and railroad uses are *inconsistent* public uses.

Matter of Boston and Albany Railroad Company, 53 N. Y. 574, 577.

Suburban R. T. Co. v. Mayor, 128 N. Y. 510, 521.

To ascertain what was the intention in this case, a chronological statement may help.

1863. Adirondack Company incorporated—to build a railroad from Saratoga to a place in the town of Newcombe, Essex County (R. 71).

1871. It amended its articles so as to make its line to be from Saratoga to a point in the town of Oswegatchie, St. Lawrence County, through counties of Warren, Essex and Hamilton (R. 71).

Under this it built its road to North Creek (R. 19), *and there it stops to this day.*

1882. Its property was sold out under the foreclosure of a mortgage and the purchasers, under the reorganization acts, organized the defendant *with a life of one thousand years* (R. 71).

1885. *The forest preserve* was created by Chapter 283 of the Laws of 1885 (p. 482), consisting of "All the lands now owned or which may be hereafter acquired by the state of New York, within the counties of" Essex, Warren and Hamilton, and other counties—and "§ 8" was this "The lands now or *hereafter constituting the forest preserve shall be FOREVER kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by ANY person or corporation public or private.*" (*Ante*, pp. 41-45.)

The forest commission, with all its machinery, was created and by section 32 a small appropriation—\$15,000—was made.

1887. By chap. 639 (p. 849) the description of the "Forest Preserve" was changed by adding certain other lands. (*Ante*, pp. 51-52.)

1890. The forest commission, with the approval and concurrence of the commissioners of the land office, was authorized to "purchase lands so located

"within such counties as include the forest pre-
 "serve, as shall be available for purposes of a
 "state park," and twenty-five thousand dollars
 was appropriated for that purpose. (Chap. 37,
 p. 42.)

1892. *In April the defendant applied to the railroad commissioners for, and on the 9th of May obtained, a certificate that in the opinion of the Board of Railroad Commissioners "the public interest, under all the circumstances, did not require the extension of the road of the Adirondack Railway Company beyond the portion thereof constructed at the time the said company acquired title to said railroad property and franchises, namely, beyond North Creek, in the County of Warren" (R. 19; in evidence, R. 72).*

The defendant's testimony (R. 19) is that this certificate is given under Section 83 of the Railroad Law, which declares such a certificate to "be irreversible by such board," and it is elsewhere called in the same section an "abandonment."

The text of the section is given *ante*, p. 29.

It is difficult to see why this did not permanently terminate the line at North Creek. *At any rate it made the life of the company good for nine hundred and ninety years.*

May 20. The legislature enacted Chapter 707 (p. 1459) of the laws of that year. Section 1 established the Adirondack park, and declared that it should be "forever reserved, maintained and cared for as ground open for the free use of all the people for their health and pleasure and as forest lands, necessary to the preserva-

"tion of the headwaters of the chief rivers in the state, and a future timber supply," and it gave the forest commission power to contract for the purchase of land subject to *no other* restriction than the right to the vendors to do certain things *within ten years*. (*Ante*, pp. 53-59.)

1893. Chapter 332 (Articles six and seven of chapter forty-three of the general laws, p. 633,) reenacted the above language as to the Adirondack park—adding the words (§ 120, p. 643,) "and shall remain part of the forest preserve." and also enacted:

"§ 121. POWERS AND DUTIES OF FOREST COMMISSION. * * * The forest commission shall have power:

"1. To contract as herein provided for the purchase of land situated within the bounds of the park as defined in the preceding section: if any such lands cannot be purchased on advantageous terms unless subject to leases or restrictions or the right to remove soft wood timber, the contract may provide accordingly, but not for any such right, lease or restriction after ten years from the date of the contract, nor the right to remove any such trees with a diameter of less than twelve inches at the height of three feet from the ground. (*Ante*, pp. 60-79.)

1894. The legislature made two appropriations for the purchase of lands and provided for the convention to "revise and amend the constitution."

1895. On the first of January came into effect the Constitution, which had been ratified sixth November, 1894, and of which the section seven of Article seven is as follows:

"The lands of the State now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by ANY corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

On the twenty-fifth of April came another long act about the forest preserve and the Adirondack park, giving the same definitions over again (*ante*, p. 79, and especially giving to the fisheries, game and forest commission control over and the exclusive power to "lay out paths and roads in park" (*ante*, p. 93), and another act authorizing the purchase of eighty thousand acres of land for the Adirondack park (chap. 395, p. 237; chap. 561, p. 368, *ante*, p. 95); under which there was expended five hundred and eighty-five thousand dollars (1 Laws 1896, p. 1066). And in 1897 came the forest preserve act (*ante*, pp. 31-40), with its *command* to the forest preserve board. "§ 2. It shall be the *duty* of the forest preserve board and it is hereby authorized to acquire for the State by purchase or otherwise land, *STRUCTURES or waters* or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game and forest law,

Laws above quoted defining the "forest preserve" referred to in the constitution (admitted by the answer R. 5, 31).

"as it may deem advisable for the interests of the State" (*ante*, p. 31), and its appropriation of a million of dollars.

It is plain that under the words "any land, structures and waters in the territory embraced in the Adirondack

" park " (*ante*, p. 31, § 2) the State can take anything—a completed railroad—and it is equally plain that the Constitution expressly *excludes* the defendant. — " shall be " forever be kept as wild forest lands. They shall not be " * * * * *taken* by ANY corporation, *public* or *private*, " nor shall the timber thereon be sold, removed or de- " stroyed."

AND, *it is also plain*, that under the CONSTITUTION, as it stands, the town authorities *cannot make an highway* through the forest preserve—the whole matter of roads *of ANY kind* being left to the forest commission (Chap. 395, Laws 1895, § 292, Sec. 291, p. 254, *ante*, p. 93).

How then about a railroad?

IV.

The defendant is forbidden by the Constitution from taking from the State the lands in question.

In deciding this case at the Special Term, Mr. Justice Chester said (R. 42):

" Under the condemnation proceedings taken by the " railway company, the title to the lands sought to be " taken does not pass upon the procuring of a judgment of " condemnation, nor does it pass until the amount of com- " pensation has been determined and actually paid to the " owners. * * *

" The compensation not having been determined and " paid, the title or right of the railway company, if any, " is the same now as when the Appellate Division vacated " the injunction.

" In the meantime the State has procured the legal title

" by the delivery of the deeds herein mentioned. * * *

" That act (Forest Preserve Act), however, provides not only for a method of appropriation by the State, but authorises the Forest Preserve Board to acquire land for the State by purchase or otherwise (§ 2). * * *

" The State having acquired the lands, they are now part of the Forest Preserve, and are brought within the protection of section seven of Article seven of the Constitution, which provides that; 'The lands of the State, now owned or hereafter acquired, constituting the Forest Preserve, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.'

" These lands are not therefore subject to be taken by this railway company,"—

Here, we submit, is the whole case. If the defendant has got a lien, *let it keep it; for the whole of its nine hundred and eighty-three years of life, if it so choose, and let it foreclose its lien, or enforce it, IF IT CAN.*

That is not what it is now trying to do. It is trying to "take" the LAND, by its license from SOVEREIGN NEW YORK—to use the sovereign's right of eminent domain.

It has not yet got the land, and the CONSTITUTION says that it cannot TAKE it.

We are dealing with the very rare case of Sovereign New York exercising the right of eminent domain *herself*. Since the days of the Grand Canal, we know of no instance where she has done so, except in the comparatively small matters of the New Capitol and the Niagara reservation. We are so accustomed to the use of the small details of that right, by private corporations, by the license and at the sufferance only of the Sovereign, and the enormous mass of case law which has grown up about those details

of that use, that the act of Sovereign New York herself, does not strike the mind with its full and simple force.

It was said upon the argument in *Beekman v. Saratoga and Schenectady Railroad Company*, 3 Paige, 45, 60,—the first case where the license to a railroad company to use the right of eminent domain was sustained,—that the legislature of New York had then (1831) incorporated about fifteen hundred turnpike, bridge and canal companies, with the license to take private property.

We are dealing also with a case—the only one we know of—where Sovereign New York is acting *herself*—by the Constitution—the *Supreme* law. This is not a case where we have to show express authority from the legislature (108 N. Y., 483).

It is the CONSTITUTION.

In delivering the opinion of the Court of Errors in the great case,—*Rogers v. Bradshaw*, 20 J. R., 735,—which affirmed the constitutionality of the canal acts, Chancellor Kent said (p. 740):

“ Surely, a statute, vesting large powers, resting very much for their exercise in undefined discretion, and checked only by the gentle admonition of doing ‘ no unnecessary damage,’ ought to be construed more benignly and more liberally. Especially ought this to be the case, when the powers are to be applied to a great public object, calculated to intimidate by its novelty, its expense, and its magnitude, and which depended for its successful results, upon decision of character, as well as upon maturity of judgment.”

V.

If, by the filing of its map, the defendant has got a lien, the State, by its appropriation proceeding, has taken that lien.

1. *The act under which the appropriation was made provides for service upon and compensation to the owner*

only, and vests the whole title in the State free of all liens, and is, notwithstanding, constitutional.

Watson v. New York Central Railroad Company, 47 N. Y., 157:

In that case land had been taken by the Attica and Buffalo Railroad Company, whose charter had in it words which are to be quoted directly.

Upon that land was the *LIEN of a judgment for money*: that is to say, one Hatch had recovered against Elijah A. Bigelow a judgment for money. Bigelow, the judgment being unpaid, made an assignment to a receiver appointed in a creditor's action brought by another creditor than Hatch, and then went into bankruptcy, and an assignee in bankruptcy was appointed.

Matters being in this shape the railroad company started to take Bigelow's land and it made parties to its proceeding the receiver and the assignee, but neither Bigelow, nor *Hatch*.

After it had got possession of the land, the proceedings having been ended, Hatch sold the land under his judgment and the plaintiff—Watson—claimed under that title.

The court of appeals of New York, speaking by Judge Rapallo, said: (47 N. Y., p. 161). "The court below held "that the act under which the proceedings for condemnation "of the land were instituted, did not require that "judgment creditors be made parties thereto. (Laws "of 1834, p. 228; 1836, p. 323; 1843, p. 226.) That "under those acts proceedings were to be taken only "against the *owners* of the land, and that compen- "sation was to be made only to such *owners*. That a "judgment creditor having a mere statutory lien, was in "no sense an owner, and that the title of the railroad "company, when acquired under the acts became para- "mount to such lien.

"The provisions of the acts in question are fully referred to in the opinion delivered at General Term by "MASTEN, J.,*" and we concur with the learned judge "that they admit of no other construction than that the "owners were the only necessary or proper parties to "the proceedings.

"The general railroad laws of 1848 and 1850 provide "for making parties all persons interested, as *owner, tenant, lessee, or encumbrancer*. But no such provision "was contained in the act of 1836, chap. 242 under "which the Buffalo and Attica Railroad Company de- "rived its powers, or in the act of 1834, chap. 177, re- "ferred to in the act of 1843, chap. 169. In those acts "the only parties for whom notice or compensation are "provided are the *owners*.

"The terms 'owner or owners,' as used in these statutes, being intended to designate the parties entitled to "the compensation which is substituted for the land "taken, should be held to embrace all persons having "estates in the land, in possession, reversion or remain- "der. (*Parks v. The City of Boston*, 15 Pick., 198.) "All persons having proprietary interests are entitled to "compensation, for the aggregate of those interests con- "stitute the ownership or fee. It has been frequently "held that tenants for years are owners within the mean- "ing of similar statutes. (*Turnpike Road v. Brosi*, 22 "Penn. State R., 29; *Brown v. Powell*, 25 *id.*, 229; *B.* "and *O. R.R. v. Thompson*, 10 Md., 76; *Parks v. City* "of *Boston*, 15 Pick., 198.) Also that a franchise issu- "ing out of the land may be regarded as real estate, "for which the owner is entitled to compensation. (*En- field Bridge Co. v. Hartford and N. H. R.R. Co.*, 17 "Conn. 454).

"But a judgment creditor of an owner has no estate or

* Sheldon, 159.

“ proprietary interest in the land. He stands wholly upon
“ the law which gives him a remedy for the collection of
“ his debt by a sale of the land under execution, in case
“ sufficient personal property of the debtor should not be
“ found. This remedy is not secured by contract, but is
“ purely statutory, and in aid of its acts have been passed,
“ from time to time, authorizing a sale of the land which
“ the debtor owned at the time of the recovery or docket-
“ ing of the judgment, or at any subsequent period, and
“ making the judgment a lien upon the land. The dura-
“ tion of this lien and the mode of its enforcement and
“ discharge are subjects which appertain to the laws for
“ the collection of debts, and the rules upon those subjects
“ have been changed, from time to time, according to the
“ will of the legislature. The power of the legislature to
“ regulate those matters can not be doubted. Acts have
“ been passed shortening and lengthening the duration of
“ the liens of existing judgments, and even providing for
“ their extinguishment without any proceeding to which
“ the judgment creditor was a party. By the act of April
“ 2d, 1813 (1 R. L., 500), it was provided that no judgment
“ theretofore rendered should be a lien for more than ten
“ years from April 9, 1811. By the act of April 3, 1821,
“ the lien of judgments recovered between April 9, 1811,
“ and April 2, 1813, was extended to ten years from the
“ time of docketing; and the lien of judgments on which
“ executions had been issued was further extended three
“ months. By the act of May 14, 1840, the duration of
“ the lien of all then existing judgments was reduced to
“ five years from the time that act took effect. (Laws of
“ 1840, chap. 386, Sec. 32.) By the act in relation to the
“ foreclosure of mortgages (Laws of 1840, chap. 342, Sec. 9),
“ it was provided that judgment creditors need not be made
“ parties to foreclosure suits, and that the lien of their
“ judgments should be cut off by the foreclosure though

" they were not parties. This act applied to existing as well as future judgments. By section 282 of the Code, " the real estate of the debtor may be exempted from the " lien of the judgment by being marked secured on appeal, " and this provision, when originally adopted, applied to " then existing judgments.

" It is clearly within the power of the legislature to " abolish the lien of all judgments at any time before rights " have become vested or estates acquired under them, and, " placing real estate on the same footing as personal property, to confine the remedies of the creditor to the property held by the debtor at the time of issuing the execution.

" This would be no greater exercise of power than the " abolition of the right of distress for rent, or of the lien " of the landlord on property taken in execution, or of the " right of imprisoning the debtor. Yet the validity of " such laws has been fully recognized even where they " affected existing claims or judgments. They do not take " away property, or affect the obligation of contracts, but " simply affect legal remedies. *There can, therefore, be no doubt of the validity of a provision causing the lien of a judgment, not ripened into a title by a sale, to be superseded by the taking of the land under proceedings in exercise of the right of eminent domain, on payment of compensation to the owner of the land.*

" We think that the act of 1836 had that effect. It is " claimed on the part of the appellant, that if the judgment creditor is not an owner, the act makes no provision for divesting his interest; and therefore the " effect of the order of condemnation is to rest in the " company the right to the land, subject to the lien of the " judgment, in the same manner as if the company had " taken by deed from the owners. But such a construction cannot be admitted.

“ The object of the act was to delegate to the company
“ the right of eminent domain, to the extent necessary to
“ enable it effectually to secure its roadway, etc., in case
“ it should fail to obtain it by contract with the owners.
“ It provides for the appraisement, on notice to the owner
“ or owners, of the value of the land taken, and of any
“ further damages which the owners may sustain by the
“ construction of the road, injury to buildings, etc. The
“ whole amount of this appraisement is directed to be
“ paid to the owners. There is no provision for assessing
“ the value of the interest of the owners, subject to the
“ lien of judgments, or for retaining any part of the
“ value of the land as indemnity against such judgments.
“ The whole value must be paid to the owners, or depos-
“ ited in bank, and the owners are left to pay their own
“ debts.

“ The act then states what right the company shall
“ obtain by virtue of such payment to the owners, and
“ the order made thereupon. On the completion of the
“ proceedings, the company is declared to be possessed of
“ the land during its corporate existence, with the right
“ to use the same for the purposes of the road.

“ This declaration excludes the implication, that, after
“ the owners have been compensated, the right of any
“ other person to interfere with the possession or use of
“ the land is reserved, or that, in order to retain such
“ use, the company is bound to satisfy liens of judgment
“ creditors, after having been compelled to pay the whole
“ value of the land to the owner.

“ What recourse the judgment creditor might obtain in
“ equity upon the proceeds paid to, or deposited to the
“ credit of the owners, is a question not involved in this
“ controversy; neither is it necessary to consider how the
“ rights of mortgagees would be affected by the proceed-
“ ing, or what protection they could obtain.

“ The matter of the lien of judgments being wholly under the control of the Legislature, they had power to confer upon the company the right of possession and use of the land free from all such liens, on paying the value of the land to the owner; and we think it was manifestly their intention so to do, modifying to that extent the laws giving liens to judgment creditors.

“ In the present case, this modification had been made before the judgment relied upon was recovered; but it is not necessary to rest our conclusion upon that ground.

“ The act of 1847 (ch. 273, sec. 3) is referred to by the counsel for the appellant, as implying that an outstanding judgment affecting the interest of an owner who had been compensated, was recognized by the Legislature as a defect in the title. But no such inference can properly be drawn from the act of 1847. Its provisions afforded a remedy to the railroad company in cases where land, obtained by conveyance from an owner, was subject to liens under which title had subsequently been perfected, and the title of the company was thus rendered invalid, and also in cases where, in proceedings for condemnation, some owner had been omitted.”

THE ACTS CONSTRUED IN THAT CASE CONTAINED THE FOLLOWING:

“ Chap. 242.

“ *AN ACT to provide for the construction of a rail-road from Attica to Buffalo.*

“ Passed May 3, 1836.”

“ Real estate. § 7. The corporation is hereby empowered to purchase, receive and hold such real estate as may be necessary for accomplishing the objects for which it is granted; and may, by their agents, surveyors and engineers, enter upon and take possession of and use,

“ all such lands and real estate as may be indispensable
“ for construction and maintenance of their single or
“ double rail-road or way, and the erection of buildings
“ necessary for stationary engines; and may also receive
“ hold and take, all such voluntary grants and donations
“ of land and real estate, for the purpose of said road, as
“ shall be made to the said corporation, to aid in the con-
“ struction, maintenance and accommodation of the said
“ road; but all lands or real estate thus entered upon,
“ which are not donations, shall be previously purchased
“ by the said corporation of the owner or owners of the
“ same, at a price to be mutually agreed upon between
“ them; and in case of any disability on the part of the
“ *owners* of such, to contract or sell the same, on account
“ of insanity, infancy or otherwise, refusal to sell, or dis-
“ agreement as to price, and before making any portion of
“ such road on said land the said corporation shall present
“ a petition to the first or senior judge of the county in
“ which such land may lie, setting forth the necessity of
“ such land for the making of such road, and the failure
“ to obtain the same by agreement, with the reasons there-
“ of, and the name and residence of each *OWNER*, if known,
“ together with a map, plan, and profile of the road, and
“ praying for the appointment of a jury of appraisers.
“ The said judge shall thereupon direct reasonable notice
“ in writing, to be given to the *OWNERS* of such lands of
“ the time of drawing of such jury, which shall be at the
“ clerk’s office in the county where the lands are situate,
“ and upon due proof thereof, and hearing the parties, or
“ such of them as may attend, and object to the regularity
“ of the proceedings on the part of the said corporation,
“ such judge, together with the clerk of said county, shall
“ draw from the grand jury box of the county the names
“ of twelve competent and disinterested jurors, who, by
“ an order to be made by such judge, and entered in the

“ common rule book of the court of common pleas, shall
“ be appointed appraisers of the damage to be sustained
“ by such owners in the construction of such road: and
“ should any person or persons so designated refuse or
“ neglect to serve on said jury, or be disqualifed, the
“ vacancy or vacancies shall be filled by said judge in
“ manner aforesaid. Said appraisers shall before entering
“ upon the duties of their office take the oath prescribed
“ by the sixth article of the constitution. The said judge
“ shall appoint a time and place for said appraisers to
“ meet, and shall cause due notice in writing to be served
“ upon such owners, or, in case of absence, to be left at
“ their usual place of residence, if within the
“ county, and if not, to be put up in some
“ conspicuous place on the premises, of the time
“ and place of meeting for the purpose of completing said
“ appraisement, and shall also cause due notice to be
“ given to the said appraisers of the time and place of
“ meeting, and said appraisers shall at such time proceed
“ to view the premises; they shall have power to examine
“ witnesses under oath, which oath any one of the said
“ appraisers is hereby authorised to administer, and shall,
“ without fear, favor or partiality, *assess the value of the*
“ *land taken, and the damages such OWNERS may sus-*
“ *tain by the taking of their lands, by injury to buildings,*
“ and in the construction of such road, without any deduc-
“ tion on account of any real or supposed benefit or advan-
“ tage which such OWNERS of such lands may derive by
“ the construction of such road. They shall make an
“ inquisition or certificate of their appraisement, specify-
“ ing the items appraised, with a map thereof, and shall
“ present the same, with the testimony taken, to the
“ county clerk, who shall file them in his office. The
“ ballots drawn from the jury box shall be replaced by
“ the county clerk. Upon proof to the said judge, within

" thirty days after the filing of the inquisition of the
 " jury, of payment to the OWNER OR OWNERS, or of
 " depositing to THEIR credit in such bank as the judge
 " shall direct of the amount of such appraisement, and of
 " all costs and expenses attending it, including reasonable
 " counsel fees (to be taxed and certified by said judge),
 " the judge shall make an order particularly describing
 " the land, and reciting the appraisement and the mode
 " of making it; which *order* shall be recorded in the office
 " of the clerk of the county in which the land is situated,
 " in like manner as if the same were a deed of convey-
 " ance; and the said corporation shall thereupon become
 " possessed of such land during the continuance of the
 " corporation, and may use the same for the purposes of
 " said road."

The act of 1843, referred to in the opinion of the Court, simply applied to the Buffalo and Attica Railroad Company a provision of section seven of the act of 1836, also referred to in the opinion, which authorized the vice-chancellor of the eighth circuit to increase or lessen the amount of the appraisement.

The exact dates of the events in this case were as follows:

1836—Company chartered.

1841—Hatch's judgment.

1843—March, Amendment giving power to the vice-chancellor.

16 November, Condemnation proceedings begun.

1844—February 23. Final order and company took possession.

PROVISIONS OF CHAPTER 220 OF LAWS OF 1897 ARE:

" § 2. It shall be the duty of the forest preserve board
 " and it is hereby authorized to acquire for the state, by
 " purchase or otherwise, land, structures or waters or such
 " portion thereof in the territory embraced in the Adiron-

"dack park, as defined and limited by the fisheries, game
"and forest law, as it may deem advisable for the inter-
"ests of the state.

"§ 3. The forest preserve board may enter on and take
"possession of any land, structures and waters in the
"territory embraced in the Adirondack park, the appro-
"priation of which in its judgment shall be necessary for
"the purposes specified in section two hundred and
"ninety of the fisheries, game and forest law, and in
"section seven of article seven of the constitution.

"§ 4. Upon the request of the forest preserve board an
"accurate description of such lands so to be appropriated
"shall be made by the state engineer and surveyor, or the
"superintendent of the state land survey, and certified
"by him to be correct, and such board or a majority
"thereof shall indorse on such description a certificate
"stating that the lands described therein have been ap-
"propriated by the state for the purpose of making them
"a part of the Adirondack park; and such description
"and certificate shall be filed in the office of the Secre-
"tary of state. The forest preserve board shall there-
"upon serve on the *owner* of any real property so appro-
"priated a notice of the filing and the date of filing of
"such description and containing a general description of
"the real property belonging to such owner which has
"been so appropriated; and from the time of such serv-
"ice, the entry upon and appropriation by the state of
"the real property described in such notice for the uses
"and purposes above specified shall be deemed complete,
"AND THEREUPON SUCH PROPERTY SHALL BE DEEMED AND
"BE THE PROPERTY OF THE STATE. Such notice shall be
"conclusive evidence of an entry and appropriation by
"the state. The forest preserve board may cause dupli-
"cates of such notice with an affidavit of due service
"thereof on such owner to be recorded in the books used

"for recording deeds in the office of the clerk of any county of this state where any of the property described therein may be situated, and the record of such notice and of such proof of service shall be evidence of the due service thereof."

"§ 5. Claims for the value of the property taken and for damages caused by any such appropriation may be adjusted by the forest preserve board if the amount thereof can be agreed upon with the owners of the land appropriated. The board may enter into an agreement with the owner of any land so taken and appropriated, for the value thereof, and for any damages resulting from such appropriation. Upon making such agreement the board shall deliver to the owner a certificate stating the amount due to him on account of such appropriation of his lands, and a duplicate of such certificate shall also be delivered to the comptroller. The amounts so fixed shall be paid by the treasurer upon the warrant of the comptroller.

"§ 6. If the forest preserve board is unable to agree with the owner for the value of property so taken or appropriated, or on the amount of damages resulting therefrom, *such owner*, within two years after the service upon him of the notice of appropriation as above specified, may present to the court of claims a claim for THE VALUE OF SUCH LAND and for such damages, and the court of claims shall have jurisdiction to hear and determine *such* claim and render judgment thereon. Upon filing in the office of the comptroller a certified copy of the final judgment of the court of claims, and a certificate of the attorney-general that no appeal from such judgment has been or will be taken by the state, or, if an appeal has been taken a certified copy of the final judgment of the appellate court, affirming in whole or in part the judgment of the court of claims, the comp-

“ troller shall issue his warrant for the payment of the
 “ amount due the claimant by such judgment, with inter-
 “ est from the date of the judgment until the thirtieth
 “ day after the entry of such final judgment, and such
 “ amount shall be paid by the treasurer.

“ § 19. When a judgment for damages is rendered for
 “ the appropriation of any lands or waters for the purposes
 “ specified in this act, and *it appears that there is any*
 “ *lien or incumbrance upon the property so appropriated*
 “ *the amount of such lien shall be stated in the judgment*
 “ *and the comptroller may deposit the amount awarded*
 “ *the claimant in any bank in which monies belonging to*
 “ *the state may be deposited, to the account of such judg-*
 “ *ment, to be paid and distributed to the persons entitled*
 “ *to the same as directed by the judgment.*”

The Court of Appeals of New York thus decided three things:

First: That by the Buffalo and Attica charter the only person required to be a party to the proceeding is the “owner.” *That is so here*—the only person here upon whom the appropriation notice is to be served is the “owner.”

That the whole value of the land is to be paid to the “owner.” *That is so here*. In *that* act the appraisers are to “assess the value of the land taken and the damages.” In *this* act the “owner” is to make his claim “for the value of such land and for any damages.” And this is made the more unmistakable by the 19th section, which provides that “if” it shall appear in proof that there is “any lien or incumbrance” the amount of such lien shall be stated in the judgment, and the comptroller “may” then deposit the money instead of paying it to the owner.

That upon so doing, in *that* act, the company is entitled

to possess and use the land. In *this act*, by the simple service upon the "owner," "*thereupon such property shall be deemed and be THE PROPERTY OF THE STATE.*"

And that it followed that the land was taken *free* from Hatch's judgment.

Secondly : That the land was *not* to be taken *subject to the lien of the judgment* was plain; the court saying: (p. 164.)

"It is claimed on the part of the appellant, that if the "judgment creditor is not an owner, the act makes no "provision for divesting his interest; and therefore the "effect of the order of condemnation is to vest in the com- "pany the right to the land, subject to the lien of the "judgment, in the same manner as if the company had "taken by deed from the owners. *But such a construc- "tion cannot be admitted.*

"The object of the act was to delegate to the company "the right of eminent domain, *to the extent necessary to "enable it to effectually secure its roadway, etc.*

"There is no provision for assessing the value of the in- "terest of the owners, subject to the lien of judgments, "or for retaining any part of the value of the land as in- "demnity against such judgments. The whole value "must be paid to the owners, or deposited in bank, and "the owners are left to pay their own debts.

"The act then states what right the company shall ob- "tain by virtue of such payment to the owners, and the "order made thereupon. On the completion of the pro- "ceedings, the company is declared to be possessed of "the land during its corporate existence, with the right "to use the same for the purposes of the road.

"*This declaration excludes the implication, that, after "the owners have been compensated, THE RIGHT OF ANY "OTHER PERSON TO INTERFERE WITH THE POSSESSION OR "USE OF THE LAND IS RESERVED, or that, in order to re-*

"tain such use, the company is bound to satisfy liens of judgment creditors, after having been compelled to pay the whole value of the land to the owner."

So here: The declaration that *"Thereupon such property SHALL BE DEEMED AND BE THE PROPERTY OF THE STATE,"* "excludes the implication that the right of any other person to interfere with the possession or use of the land is reserved," but shows that the object of the act was to use the right of eminent domain to the extent necessary to acquire the land *effectually for the use of the State*, and that that use excludes its use for a railroad is conclusively shown by the Constitution—"They shall not * * * be taken by any corporation, public or private."

That this means railroads most of all is certain—because with the exception of telegraph companies *railroad corporations are the ONLY corporations of any consequence which, under existing laws, can be formed, so as to take lands within the limits of the Adirondack park*, and the prohibition against their being taken by any "public" corporation is plainly meant to prevent the legislature from organising cities and villages in the park.

Thirdly: That because the lien of the judgment was a *statutory* one the legislature had the constitutional power to do this.

But, 1, the lien claimed here is a *statutory* one, purely. Not only is it created solely by statute, but the proceeding has been changed by statute numberless times.

2. The legislature can take property which has been acquired *by the right of eminent domain* for a public use, and *that is what this lien is if it is anything*, and apply it to another public use, and that without compensation—the constitutional prohibition being only against the taking of "*private*" property without compensation.

Matter of City of Buffalo, 68 N. Y., 167, 171.

3. The power to alter or repeal is expressly reserved not only in the statute, but in the Constitution.

4. And again, suppose the legislature should *kill* the Adirondack Company, which it may do,

People v. O'Brien, 111 N. Y., 1;
what would become of the lien?

In *Gunn v. Barry*, 15 Wall. 610, 611, the Court held that the lien of a judgment was a part of the obligation of the contract and could not be displaced by the legislature—but that does not affect the argument, because the lien claimed in this case *can be displaced* by the legislature.

THIRDLY.

That chapter two hundred and twenty of the laws of New York of 1897, does not command a procedure, which is due process of law, and is thus contrary to the fourteenth amendment, and is unconstitutional and void.

I.

The question is not here.

The State holds the land by deed as well as by condemnation (R. 53, 54), and the title acquired by deed is sufficient to sustain the judgment.

II.

**Chapter two hundred and twenty of the
Laws of New York of one thousand eight
hundred and ninety-seven (*ante* pp. 31-40)
is constitutional and valid.**

Beekman *v.* Saratoga and Schenectady Railroad Company, 3 Paige, 45, 72.
 Varick *v.* Smith, 5 Paige, 136, 159.
 Bloodgood *v.* Mohawk and Hudson Rail Road Company, 14 W. R. (Wendell) 51, 56; 18 W. R., 9, 13, 17.
 Sweet *v.* Rechel, 159 U. S., 380, 407.
 Davidson *v.* New Orleans, 96 U. S., 97, 104.
 Castello *v.* McConnico, 168 U. S., 674, 683.
 Holden *v.* Hardy, 169 U. S., 366, 384, 390.
 Orient Insurance Co. *v.* Daggs, 172 U. S., 557, 563.

The contention is that the act does not give to the land-owner the right to be heard as to whether his land should be taken.

It is certain that at the time of the adoption of *all* constitutions—*no* act gave to the person whose property was to be taken any such right, and the practice was universal to the contrary—though nearly all acts took care that he should be heard on the question of the amount of compensation.

All the canals of New York were built under such acts, and the canal laws so stand to this day (*ante*, pp. 96 *et seq.*).

It has always been held that this is a legislative—not a judicial question. *Matter of Poughkeepsie Bridge Co.*, 108 N. Y., 483, 490.

If the legislature transcends its power and takes land for

other than a public use there is simply no *taking*. The whole proceeding is void and the landowner has his day in court when any one asserts any right—or he can put him off the land by force.

And this has been often decided.

In *Boon Co. v. Patterson*, 98 U. S., 403, the Court speaking, by Mr. Justice Field said (p. 406):

“ The position of the company on this head of jurisdiction is this: That the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. *This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned.* The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitution of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is NOT A SUBJECT OF JUDICIAL COGNIZANCE. THE PROPERTY MAY BE APPROPRIATED BY AN ACT OF THE LEGISLATURE, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance.”

(P. 407.) “ The point in issue was the compensation to be made to the owner of the land; in other words,

“ the value of the property taken. No other question was open to contestation in the District Court. “ *Turner v. Halloran*, 11 Minn., 253. The case would “ have been in no essential particular different *had the State authorized the company by statute to appropriate the PARTICULAR property in question*, and the owners to “ bring suit against the company in the courts of law for “ its value.”

Italics and capitals mine.

In *United States v. Jones*, 109 U. S., 513, the Court, again speaking by Mr. Justice Field, said (p. 518):

“ There is, in this position, an assumption that the “ ascertainment of the amount of compensation to be “ made is an essential element of the power of appropri-“ ation; but such is not the case. The power to take “ private property for public uses, generally termed the “ right of eminent domain, belongs to every independent “ government. It is an incident of sovereignty, and, as “ said in *Boom v. Patterson*, 98 U. S., 106, requires no “ constitutional recognition. The provision found in the “ Fifth Amendment to the Federal Constitution, and in “ the Constitutions of the several States, for just compen-“ sation for the property taken, is merely a limitation “ upon the use of the power. It is no part of the power “ itself, but a condition upon which the power may be “ exercised. It is undoubtedly true that the power of “ appropriating private property to public uses vested in “ the general government—The right of eminent domain, “ which Vattel defines to be the right of disposing, in case “ of necessity and for the public safety, of all the wealth “ of the country—cannot be transferred to a State any “ more than its other sovereign attributes; and that, when “ the use to which the property taken is applied is public, “ the propriety or expediency of the appropriation can-

“ not be called in question by any other authority. But
 “ there is no reason why the compensation to be made
 “ may not be ascertained by any appropriate tribunal
 “ capable of estimating the value of the property.”

Italics mine.

In *Bauman v. Ross*, 167, the Court, speaking by Mr. Justice Gray, said (p. 574):

“ In the Fifth Article of the earliest amendments to the
 “ Constitution of the United States, in the nature of a
 “ Bill of Rights, the inherent and necessary power of the
 “ government to appropriate private property to the public
 “ use is recognized, and the rights of private owners are
 “ secured by the declaration, ‘ nor shall private property
 “ be taken for public use without just compensation.’ ”

And in *Backus v. Fort Street Union Depot Co.*, 169, U. S., 557, the Court, speaking by Mr. Justice Brewer, said (p. 568):

“ Neither can it be said that there is any fundamental
 “ right secured by the Constitution of the United States
 “ to have the questions of compensation and necessity
 “ both passed upon by one and the same jury. In many
 “ States the question of necessity is never submitted to
 “ the jury which passes upon the question of compensa-
 “ tion. *It is either settled affirmatively by the legisla-*
“ ture, or left to the judgment of the corporation invested
“ with the right to take property by condemnation. The
“ the question of necessity is not one of a judicial
“ character, but rather one for determination of the law-
“ making branch of the government. Boom Company v.
“ Patterson, 98 U. S., 403, 406; *United States v. Jones*,
“ 109 U. S., 513; Cherokee Nation v. Kansas Railway
“ Company, supra.”

(p. 569) “ All that is essential is that in some appro-
 “ priate way, before some properly constituted tribunal,

"inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution. Bauman v. Ross, 167 U. S., 548, 593.

Italics mine.

The judgment should be affirmed.

EDWARD WINSLOW PAIGE,
Of Counsel.

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.
(27 App. Div., 326).

PARKER, *P. J.*; LANDON, HERRICK, MERWIN and PUTNAM, *Asst. Jsts.*

ALBANY, January, 1898.

<p>ADIRONDACK RAILWAY COMPANY, Respondent,</p> <p><i>against</i></p> <p>INDIAN RIVER COMPANY <i>et ors.</i> Appellants.</p>	} No. 34-10.
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EUGENE L. ASHLEY, S. & L. M. BROWN (EDWARD WINSLOW PAIGE, of Counsel), for Appellants.

LEWIS E. CARR, for Respondent.

The defendants being the owners of a large amount of wild lands in townships numbers 15 and 32, Totten and Crossfield's patent, so called, offered to sell the whole of Township number 15, and 18,000 acres in Township 32 to Forest Preserve Board; such offer and negotiations finally culminated in the Board of Forest Preserve, on the 6th of August, 1897, passing a resolution accepting such offer of the defendants, a portion of such resolution being as follows: "Resolved: That we accept the offer of Mr. McEchron and the other owners of about 18,000 acres of Township 32, T. & C. and 24,000 acres of Township 15 of the same purchase, including in this total acreage 8,000 acres more or less of virgin forest land."

The defendants at that time were not the owners of all of Township 15, or of all of the 18,000 acres in Township 32, but proceeded to acquire, and did become the owners in fee, or placed themselves in position to transfer to the State the title in fee to all, of such lands, prior to the filing of the maps by the plaintiff as hereinafter set forth.

The plaintiff is a railroad corporation, maintaining and operating a line of railroad from Saratoga Springs, in the County of Saratoga, to the Village of North Creek, in the County of Warren, and has procured the right to extend the same to Long Lake, in the County of Hamilton. And for the purpose of extending its route to Long Lake it caused a map and profiles of its routes from North Creek to Long Lake to be made, duly certified by the president and engineer, and filed such map or maps on the 18th day of September, 1897, in the offices of the Clerks of the Counties of Warren, Essex and Hamilton, through or into which counties such route extended; and thereupon gave written notice to each of the defendants, with the exception of the defendant Jeremiah W. Finch, who it states at the time of the commencement of this proceeding it has not been able to serve, stating the time and place where such maps and profiles were filed, and the route adopted by it passing over lands occupied by them. A portion of the route so adopted passes over the tract of land known as Township 15, and over the land agreed to be sold by the defendants to the Board of Forest Preserve, and agreed by it to be purchased of the defendants.

The plaintiff commenced this action for an injunction restraining the defendants, and each of them, from conveying or suffering to be conveyed, either directly or indirectly, to the Forest Preserve Board or the State, during the pendency of this action, so much of that tract known as "Township 15" as is comprised within the route adopted by plaintiff over said township, except said

conveyance be expressly made and received subject to the right of way thereover of the plaintiff's own route, and that they be perpetually enjoined and restrained from conveying or suffering to be conveyed any portion of said township, except as subject to such right of way.

The plaintiff states in its complaint, "That said tract, " known as 'Township 15' as aforesaid, lies within the "limits of the Adirondack Park as defined and limited "in and by the Fisheries, Game and Forest Law, and "also within the limits of the Forest Preserve as defined "and limited in and by said law."

The plaintiff's claim is that if "a conveyance was made "without restriction it would be deprived of its rights to "acquire right of way by condemnation by virtue of the "provisions of Section 7, Article 7, of the Constitution," and as the lands adjacent to "said Township 15 on either "side thereof, said lands being also within the limits of "said Forest Preserve, have already been acquired and "are owned by the State, will absolutely deprive the plain- "tiff of its right to extend its road as aforesaid, and put "it to great and irreparable loss."

An injunction *pendente lite* was granted, and application was made to set it aside, which was denied, and a motion came on to be heard at a Special Term why such injunction should not be continued, and such injunction was continued, and from the order thereupon made this appeal is taken.

HERRICK, J.:

The Forest Preserve, the Adirondack Park, and what shall be embraced therein are defined in Chapter 395 of the Laws of 1895.

By Chapter 220 of the Laws of 1897, the Governor of the State of New York was authorized to appoint three persons to constitute a board known as the Forest Preserve Board.

Section 2 of that Act provides that it shall be the duty of such Board and it is thereby authorized, "To acquire for " the State, by purchase or otherwise, land structures, or " waters, or such portion thereof in the territory embraced " in the Adirondack Park, as defined and limited by the " Fisheries, Game and Forest Law, as may be deemed " advisable for the interest of the State."

The Act prescribes how lands may be condemned and appropriated, and a method for the owners obtaining damages for such appropriation in the event of the Forest Preserve Board being unable to agree with them as to the value of the property so taken or appropriated.

The Forest Preserve Board then, in making this agreement with the defendants for the purpose of its land, was in the exercise of the powers and in the performance of the duties conferred and imposed upon it by the statute referred to, and the injunction here, while in form one restraining the defendants only, it is evident must also operate to obstruct the Forest Preserve Board in the exercise of its powers and the performance of its duties, because if the defendants cannot convey title the Forest Preserve Board cannot receive it.

Undoubtedly an injunction may be granted in proper cases to prevent public officers, under color of official power or duty, from doing some illegal act affecting injuriously individual rights or property.

People v. Canal Board, 55 N. Y., 390.

Flood v. Van Wormer, 147 N. Y., 284.

But the illegality of the proposed act and the rights of the persons seeking the injunction should, however, both be made plainly to appear, and in determining an application for an injunction, which while in form against private persons only, yet, in effect, restrains or obstructs the action of public officers in the exercise of their powers and the discharge of their official duties, the same considera-

tion, to some extent at least, should be given to the rights of the State, the power and duties of the public officers, and as to whether their proposed action is illegal or not, as though the injunction applied for was to directly, instead of indirectly, restrain their action.

I shall therefore consider the rights of the State and the powers and duties of its officers and representatives, "The Forest Preserve Board," as well as those of the plaintiff and the defendants, in determining whether this injunction should have been granted.

The Forest Preserve Board is exercising in behalf of the State that power known as the right of eminent domain, which is ordinarily exercised by first attempting to agree with the owners of the property to be taken, upon the purchase price thereof, and if an agreement cannot be reached then taking it by compulsory process, an appropriate tribunal awarding the owners their damages for the same, which is the proceeding authorized by the statute here, under and pursuant to which the Forest Preserve Board and the defendant were acting in making the agreement above referred to.

The plaintiff says, however, that the right to exercise this power of eminent domain has been conferred upon it, and as part of the procedure in exercising that power it made maps and filed profiles of its proposed route, served notices upon the property owners, and has thereby acquired a lien upon the land which further procedure will ripen into an absolute right or title. And that the property having been appropriated for one public use, it cannot be taken for another without express authority of the Legislature.

It has been held that where a railroad corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected thereby,

it has acquired a right to construct and operate its road upon said line, and by these proceedings has impressed upon the land a lien in favor of its rights to construct, which ripens into title through purchase or condemnation proceedings.

Rochester, H. & L. R.R. Co. *v.* N. Y. L. E. & W. R.R. Co., 110 N. Y., 128.
S. R. T. Co. *v.* Mayor, 128 N. Y., 510.

It will be observed that both these cases, and I think all others of similar purport, are cases where the contention was between corporations claiming to exercise the right of eminent domain. In no case that I have seen has the contention arisen between a corporation and the State; it is a power that cannot be asserted against or in opposition to the State, that it cannot be so asserted or exercised, will be further discussed in another connection.

The plaintiff, claiming that it has thus acquired a right to the route in question, has, so to speak, appropriated it, further relies upon the rule that has been repeatedly stated by the Courts, that where land has been once appropriated for a public purpose it cannot be appropriated for another, unless such authority is conferred in express terms or by necessary implication.

Matter of B. & A. R.R. Co., 53 N. Y., 574.
Matter of Rochester Water Commissioners, 66 N. Y., 413-18.

In the Matter of N. Y. C. & H. R. R.R. Co., 77 N. Y., 248-56.

Matter of B. H. T. & W. R.R. Co., 79 N. Y., 64-68.

The above cases, as well as numerous others to the same effect, are cases where the power was attempted to be exercised by public corporations, some of them municipal, and none of them were cases where the State itself had or was attempting to exercise its power.

It is a rule of construction, not a definition of the power itself, for it is conceded that "The Legislature may interfere with property held by a corporation for one public use, and apply it to another, and without compensation where no private interests are involved or invaded. The Legislature may delegate this power to public officers or to corporate bodies, municipal or other. It is a rule, however, that such delegation of power must be in express terms or must arise from a necessary implication."

Matter of City of Buffalo, 68 N. Y., 167.

The reason of the rule is stated to be, "Because it could not be intended that the State, having authorized one taking whereby the lands became impressed under authority of the sovereign with a public use, meant to nullify its own grant by authority to another corporation to take them again for another public use unless it so specifically decreed, it has been ruled that lands so held and impressed with a public trust were not embraced in words of general authority. Were the rule otherwise this evil would result: a corporation, number one, having the right of eminent domain, takes land from a similar corporation, number two, having the same right; number two thereupon proceeds again to condemn it for its own use, and number one retaliates, and so the absurd process goes on. It is clear that the Legislature never meant any such result, and hence, from any general grant containing in its terms no word of exception, there is necessarily excepted property already held upon a public trust by the authority and under the ward and control of the State."

Matter of Petition of N. Y., L. & W. R.R. Co., 99 N. Y., 12-23.

The rule only applies to cases where authority has been conferred upon others to exercise the power, and neither the rule nor the reason for it applies where the State

itself is exercising the right for its own immediate purposes.

The right or power of eminent domain is one inherent in, and incident to sovereignty. Like the police power it is one that cannot be alienated or parted with.

Black's Constitutional Law, 123 and Note.

Cooley's Constitutional Limitations, 524-525.

While the Legislature may authorize public or *quasi*-public corporations to exercise such power for the public benefit, it cannot do so to such an extent as to prevent the State itself from exercising it at any time, nor can it place such corporations upon an equality with the State in the exercise of such powers.

The Legislature cannot alienate or part with any of the inherent sovereign powers of the state, or by any act preclude it from exercising them untrammelled by any restraints except those voluntarily imposed by the Constitution itself. While refraining to act itself, the State may in the meantime authorize others to exercise the power, but such authorization or delegation is not a parting with any of its own power or authority in the premises, and when it chooses to exercise that power it is exclusive.

The authority to take and condemn lands for railroad purposes is subject to these limitations, and the plaintiff has no rights that it can assert in opposition to or in conflict with them.

Neither can the plaintiff avail itself of the principle that neither the State nor any corporation authorized to take property for a public purpose will take more than that purpose requires, and that where the use of property for one public purpose is not inconsistent with its use for another public purpose it may be used for both, and claim that the taking of this land for park purposes is not inconsistent with the use of a portion for railroad purposes.

To my mind, the operating of a railroad through a tract of land is not in harmony with its use as a forest park.

And the declaration of the State through its constitution and by legislative acts indicates very clearly, it seems to me, that the use and occupation of these lands within the Forest Preserve of the Adirondack Park is intended to be exclusive.

Section 7 of Article 7 of the Constitution reads as follows: "The lands of the State, now owned or hereafter acquired, "constituting the Forest Preserve, as now fixed by law, "shall be forever kept as wild forest lands. They shall "not be leased, sold or exchanged, *or be taken by any* "corporation, public or private, nor shall the timber "thereon be sold, removed or destroyed."

The plaintiff realizes the full force and strength of this provision, because its action is brought upon the theory that if the State once acquires possession of this land, that then under the Constitution it can acquire no right to operate its road through such land; and it seems to me a fair deduction from that, that if the State has no power to grant any such right, it should not take any land for the forest preserve subject to any such right.

If the granting by the State of any such right is inconsistent with its use as a forest preserve, then the acquiring of any land subject to such right would be inconsistent with the purpose for which it is acquired.

The Legislature has also spoken upon the subject, by Section 290 of Chapter 488 of the Laws of 1892. After describing what shall constitute the Adirondack Park, it provides as follows: "Such park shall be forever re- "served, maintained and cared for as ground open for the "free use of the people, for their health and pleasure and "as forest lands."

This coupled with that portion of the Constitution providing that such forest preserve "Shall be forever kept

as 'wild forest lands,' seems to me is entirely inconsistent
 "with the use of the same or any portion thereof for
 "railroad purposes."

There seems to be an incongruity between the use and preservation of lands as wild forest lands, and permitting railroads to traverse the same. But there is a further indication of the intent of the State. Section 291 of the same chapter confers power upon the Forestry Commission to purchase land situated within the boundaries of the Park, and provides that, "If such lands cannot be purchased on advantageous terms, unless subject to the leases or restrictions, or the right to remove soft wood timber, the contract may provide accordingly but not for any such right, lease or restriction after ten years from the date of the contract."

Under well known rules of statutory construction this is exclusive.

Providing for their taking lands subject to specific named burdens excludes, by implication, their right to take them subject to any other burdens.

Matter of Albany Street, 11 Wend., 148.

Rathbone *v.* Wirth, 6 App. Div., 289; approved in 150 N. Y., 475.

They could not therefore take it subject to the right of the plaintiff to operate its road upon or through it, if for no other reason than that it runs for more than ten years.

By the Forest Preserve Act, being Chapter 220 of the Laws of 1897, "The Forest Preserve Board is authorized to acquire for the State by purchase or otherwise, lands, structures or waters or such portion thereof, in the territory embraced in the Adirondack Park, as defined and limited by the Fisheries, Game and Forest Law, as it may deem advisable for the interests of the State" (Section 2).

Section 3 authorizes such Board to "enter on and take

" possession of any lands, structures and waters in the
" territory embraced in the Adirondack Park, and other
" sections provide a method whereby the owners of such
" lands, structures or waters may obtain damages for the
" taking of such lands, structures and waters if they can-
" not agree with the Forest Preserve Board as to the
" amount."

The language of this section I think is abundantly sufficient to authorize the appropriation of land condemned for railroad purposes, and of the structures erected by any railroad within such park.

In Chapter 220 there is also a proviso for the reservation of certain timber rights for a limited period of time, by the owners of the land appropriated, and under the rule of statutory construction I have before referred to, that excludes the reservation of any other right, so that it seems to me that taking into consideration the purpose for which these lands are to be used, the wording of the Constitution, and of these several acts of the Legislature that the use of these lands acquired or to be acquired in the Adirondack Park was to be exclusive in the State, and excludes the use of it or any portion of it for any other than park purposes.

In addition it may be said that the State authorities in prescribing the boundaries of the Park, which included within its lands, and authorizing the acquisition of any and all lands within its boundaries for park purposes, was public notice to the plaintiff and others that whatever rights final or inchoate they might acquire therein, they took subject to being divested of them by the State acquiring the land for its own purposes.

I think, therefore, that the plaintiff had no rights under the privilege granted to it to condemn land for railroad purposes and had acquired none that it could assert against the State.

That the using of lands for railroad purposes is inconsistent with devoting and preserving it for park purposes as wild forest lands.

That the State intended to take and hold the lands in the Adirondack Park free and clear of all incumbrances. And that the Forest Preserve Board in its agreement with the defendants to purchase lands was exercising the power of eminent domain for the State.

That any rights or privileges the plaintiff has under the power of eminent domain were taken subject and subordinate to the right of the State to exercise that power in its own immediate behalf.

But on the other hand, if the plaintiff is right in its contention, that by making and filing its maps and profiles and serving the required notices it acquired a lien upon the land, it needs no injunction to protect its rights, for any conveyance by the defendants must be subject to that lien, and as the State can only acquire from the defendants what the defendants can lawfully convey, it would take such lands subject to the plaintiff's lien or right to build its road.

I am of the opinion, therefore, that because in one aspect of the case an injunction is not needed to protect the plaintiff's claim of right, and in another aspect of the case it is a practical interference with, restraint upon, and obstruction to, the exercise by the State of its power of eminent domain, the injunction should be vacated and set aside.

Order reversed, and injunction vacated with \$10 costs and disbursements.

All concur. Parker, *P. J.*, Landon and Merwin, *JJ.*, upon ground last stated in the opinion.

ADIRONDACK RAILWAY COMPANY *v.* NEW YORK STATE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 439. Argued January 15, 16, 1900.—Decided February 26, 1900.

While the legislative power to amend or repeal a statute cannot be availed of to take away property already acquired, or to deprive a corporation of fruits of contracts lawfully made already reduced to possession, the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and, when unexecuted, cannot be held to be in itself a vested right surviving the existence of the franchise, or an authorized circumscription of its scope.

The highest court of the State of New York having held that there is no property in a naked railroad route in that State which the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are by appropriate legislation authorized to act, this court accepts the views of that court, and thinks that the proceedings on the part of the State which are complained of in this case, impaired the obligation of no contract between it and the railway company.

The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the Government; and this must obviously be so when the State takes for its own purposes.

Statement of the Case.

THIS was a writ of error to a judgment of the Court of Appeals of the State of New York affirming a final judgment of the Supreme Court of New York perpetually enjoining the Adirondack Railway Company from taking certain lands by condemnation proceedings. The People of the State of New York brought the action and obtained judgment at a special term of the Supreme Court, which was reversed by the Appellate Division, 39 App. Div. 34, whose order was in turn reversed by the Court of Appeals, and the original judgment affirmed. 160 N. Y. 225.

The case is thus stated in the opinion of the Court of Appeals by Vann, J.:

"In 1882 the Adirondack Railway Company was incorporated for the term of one thousand years to construct and operate a railroad from Saratoga Springs to the river St. Lawrence, near the city of Ogdensburg. It was a reorganization of an older corporation known as the Adirondack Company, which was organized in 1863, under the provisions of chapter 236 of the laws of that year. Prior to the foreclosure which resulted in the reorganization, the Adirondack Company had constructed a railroad from Saratoga Springs to North Creek, in the county of Warren, and this railroad, together with the right to extend the same, became the property of the Adirondack Railway Company, which, in April, 1892, applied to the railroad commissioners for a certificate, under chapter 565 of the laws of 1890, to relieve it from the statutory obligation of extending its lines; on the 9th of May following, the commissioners issued their certificate accordingly. The Adirondack Railway Company, thenceforth called the defendant, made no attempt to extend its road until the early part of 1897, when a survey was made for a proposed extension from North Creek through the counties of Warren, Hamilton and Essex, to the outlet of Long Lake in Hamilton County, where it was expected that, by connecting with other roads, a route would be secured to the St. Lawrence River. Before anything further was done to extend the road, certain action, taken by the State, should be briefly alluded to.

"In 1885 the forest preserve was created by statute, embrac-

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ing 'all the lands now owned, or which may be hereafter acquired by the State of New York within' certain counties, and the area was extended by subsequent legislation. (L. 1885, ch. 283; L. 1887, ch. 639; L. 1893, ch. 332.) These acts required said lands to be forever kept as wild forest lands, and provided that they should not be sold, leased or taken by any corporation, public or private. A forest commission with appropriate powers was created to care for the forest preserve, and appropriations were made from time to time to enable it to properly discharge its duties.

"In 1890 the forest commission was authorized to 'purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park,' and in 1892 the Adirondack park was established and placed under the control of said commission. (L. 1890, ch. 37; L. 1892, ch. 707.)

"The revised constitution, which went into effect on the 1st of January, 1895, provides that 'the lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.' (Const., art. 7, § 7.)

"In 1895 the legislation relating to the forest preserve and the Adirondack park was extended by the fisheries, game and forest law, and it was declared by section 290 that 'such park shall be forever reserved, maintained and cared for as ground open for the free use of all the people for their health and pleasure and as forest lands necessary to the preservation of the headwaters of the chief rivers of the State, and a future timber supply; and shall remain part of the forest preserve.' (L. 1895, ch. 395, §§ 270, 295.) During the same year the forest commission was authorized to purchase 80,000 acres for the use of the Adirondack park. (L. 1895, ch. 561.) In 1897 an act was passed, the object of which, according to its title, was 'to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor.' (L. 1897, ch. 220.) By this act the appoint-

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ment of a forest preserve board was authorized, and it was made its duty 'to acquire for the State, by purchase or otherwise, land, structures or waters, or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game and forest law, as it may deem advisable for the interests of the State.' Section 3 of said act provides that 'the forest preserve board may enter on and take possession of any land, structures and waters in the territory embraced in the Adirondack park, the appropriation of which in its judgment shall be necessary for the purposes specified in section 290 of the fisheries, game and forest law, and in section 7 of article 7 of the constitution.' It is provided by the next section that 'upon the request of the forest preserve board an accurate description of such lands so to be appropriated shall be made by the state engineer and surveyor, or the superintendent of the state land survey, and certified by him to be correct, and such board or a majority thereof shall indorse on such description a certificate stating that the lands described therein have been appropriated by the State for the purpose of making them a part of the Adirondack park; and such description and certificate shall be filed in the office of the Secretary of State. The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description, and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State. § 4. Provision is made by the next section for the payment for lands so taken and for damages resulting from the appropriation by agreement with the owner and the delivery of a certificate payable by the state treasurer upon the warrant of the comptroller. § 5. If the forest preserve board is unable to agree with the owner upon

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the value of the property appropriated, the owner, within two years after the service upon him of the notice of appropriation, may present a claim for the value of the land to the Court of Claims, which has jurisdiction to hear and determine the same and to render judgment thereon. The amount of the final judgment is payable to the treasurer upon the warrant of the comptroller. § 6. No provision is made by the act for the payment of any lien upon the lands except that when a judgment for damages is rendered and it appears that there is a lien or incumbrance upon the property appropriated, the amount thereof shall be stated in the judgment and the comptroller may deposit the amount awarded in the proper bank to be paid and distributed to the persons entitled to the same as directed by the judgment. § 19. The sum of \$600,000 was appropriated for the purposes specified in the act, and the comptroller was authorized to borrow \$400,000 more upon the request of the forest preserve board to be expended under its direction.

"On the 6th of August, 1897, after certain negotiations with the owners of a part of an extensive tract of land known as the Totten & Crossfield purchase, the forest preserve board passed a resolution accepting the offer of the owners of about 18,000 acres of township 23, and 32,000 acres of township 15 of that purchase for the sum of \$149,000, of which \$99,000 was for the land and \$50,000 was for certain improvements at Indian Lake for the use of the State, to be made in accordance with the plans and specifications to be furnished by the state engineer. Township 15 of the Totten & Crossfield purchase lies, as is admitted in the answer, 'wholly within the bounds of the forest preserve and also of the Adirondack park.' Upon the 15th of August, 1897, a representative of the state engineer with a surveying party began surveying at Indian Lake for the purpose of constructing a dam at its mouth in order to stow water for the use of the Champlain Canal and for water power on the Hudson River. Upon the completion of the survey plans and specifications were prepared and the construction of the dam was commenced.

"September 18, 1897, the defendant caused a map and pro-

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file to be filed in the counties of Hamilton, Warren and Essex for the extension of its road across township 15, which the forest preserve board had agreed to purchase as aforesaid, and which lies partly in each of said three counties. It also gave notice of such filing to the occupants as required by statute, but did nothing else. About the 1st of October following, as the owners were about to convey to the State the lands covered by the resolution of August 6th, and receive their money, they were restrained from so doing by an injunction issued in an action brought by the Adirondack Railway Company against them. Thereupon they placed the deed *in escrow* to be delivered when the injunction was dissolved, made another deed embracing the same premises, except the land described in the railroad survey, delivered it to the forest preserve board, and received the \$99,000, according to agreement. Immediate steps were taken to vacate the injunction, but they were not at first successful, and on the 7th of October the forest preserve board met, and learning that the justice who granted the injunction had declined to vacate it, they took steps to appropriate the land in question for a park under the power of eminent domain. The state engineer having furnished a description in writing of the six-rod strip, which the defendant desires for a railroad, and certified that the same was correct, the three members of the forest preserve board, acting under chapter 220 of the Laws of 1897, annexed thereto a certificate of condemnation and signed the same as the forest preserve board, in these words: 'State of New York, county of Albany, city of Albany, *ss.* We, Timothy L. Woodruff, Charles H. Babcock and Campbell W. Adams, being the forest preserve board, acting under and in pursuance to an act of the legislature of the State of New York, being chapter 220 of the Laws of 1897, entitled "An act to provide for the acquisition of land in the territory embraced in the Adirondack park and making an appropriation therefor," do hereby certify that the lands in township 15, Totten & Crossfield purchase, in the counties of Hamilton, Essex and Warren, of the State of New York, described in the foregoing certificate of the state engineer, have been and hereby are

Counsel for Parties.

duly appropriated by the State of New York for the purpose of making them a part of the Adirondack park.' These papers, indorsed 'state engineer's certificate and description and forest preserve board's certificate of condemnation,' were filed in the office of the secretary of state on the 7th of October, 1897. On the same day a notice of this action of the board, with a general description of the property appropriated and a copy of the papers above mentioned, were served on William McEchron, the president of the Indian River Company, which then owned the lands involved. This service was made, as the special term is presumed to have found, at ten minutes before noon. On the same day the defendant began proceedings to condemn said strip for the purpose of extending its railroad, but as the special term is also presumed to have found, they did not file the *lis pendens* until afternoon, and hence not until after the aforesaid proceeding in behalf of the State had been completed. No notice of condemnation was served on the defendant.

"On the 2d of March, 1898, the injunction restraining the conveyance of said lands to the State was reversed on appeal by the appellate division, and thereupon the original deed *in escrow* was delivered and recorded. The defendant went on with its condemnation proceedings until it was restrained by a temporary injunction granted in this action, which was brought to restrain that company and the other defendants from further continuing the proceedings to condemn.

"The defendant alone answered, and after a trial the special term rendered judgment for the People, perpetually enjoining it from taking the land. Upon appeal the judgment was reversed by the appellate division and a new trial ordered, by a divided vote, upon the ground that the company, by the filing of its map on the 18th of September, had impressed upon the land a lien that was good as against the State of New York. The People have appealed to this court, giving the usual stipulation for judgment absolute."

Mr. R. Burnham Moffat for plaintiff in error.

Mr. Edward Winslow Paige for defendant in error.

Opinion of the Court.

MR. CHIEF JUSTICE FULLER, after making the above statement, delivered the opinion of the court.

The Court of Appeals ruled that on the record it must be presumed that all the facts warranted by the evidence and necessary to support the judgment were found by the courts below; that it was to be assumed that the condemnation proceedings instituted by the forest preserve board were fully completed as required by the statute of 1897 before proceedings to condemn on its part were commenced by the railroad company; and that, thereby, if the condemnation act under which the board proceeded was valid, title to the strip of land in question passed to the State, became a part of the forest preserve, and the railroad company was forbidden by the Constitution to take it. The court sustained the validity of the law, and, without discussing "whether the State became the equitable owner through contract, possession and performance," held that "it became the legal owner through the power of eminent domain."

Plaintiff in error contends, in substance: that it possessed by contract a vested right to construct its road over the six-rod strip in question, and to take that strip by the exercise of the power of eminent domain, and that the condemnation features of the act of 1897, as construed by the Court of Appeals, are void because impairing the obligation of the contract; that the condemnation features of the act as construed to confer authority on the State to acquire, by the proceedings in question, title to the six-rod strip are unconstitutional and void in that they authorize the taking from plaintiff in error its vested property right to construct, maintain and operate its railroad over said strip, "without any notice whatsoever or opportunity to be heard, and without the making of any compensation therefor;" that the proceedings authorized by the act of 1897 do not constitute due process of law.

Section 1 of Article VIII of the constitution of New York authorized the formation of corporations under general laws, and by special act (for municipal purposes and) in cases where in the judgment of the legislature the objects of the corpora-

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tion could not be attained under general laws, but provided that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The Adirondack company was organized in 1863 under the general railroad law of New York of April 2, 1850, which reserved the right of the legislature to "at any time annul or dissolve any incorporation formed under this act."

The Revised Statutes, in force from 1829 to 1882, provided: "The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature."

By an act of March 31, 1865, the Adirondack company was authorized to "amend its articles of association so as to enable it, under the general law, to extend its railroad to some point on Lake Ontario or river St. Lawrence."

April 25, 1867, the railroad law of April 2, 1850, was amended so as to provide that if corporations formed under the act should not within five years after the filing and recording of its articles of association commence construction or finish its road and put it in operation within ten years, its corporate existence and powers should cease.

In 1882 the railroad of the Adirondack company extended from Saratoga Springs to North Creek, and in that year the Adirondack railway company acquired all the rights of the Adirondack company, and, under the reorganization laws of New York, organized itself with a life of a thousand years.

The eighty-third section of the railroad law of June 7, 1890, provided as follows: "A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the State shall certify that in their opinion the public interests under all the circumstances do not require such extension. If such board shall so certify and shall file in their office such certificate, which certificate

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shall be irreversible by such board, such corporation shall not be deemed to have incurred any obligation so to extend its road, and such certificate shall be a bar to any proceedings to compel it to make such extension, or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which has been constructed or operated or apply to Kings County."

On the ninth of May, 1892, on the application of the Adirondack railway company, the board of railroad commissioners issued its certificate, certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road of the Adirondack railway company beyond the portion thereof constructed at the time the said company acquired title to said railroad property and franchises, namely, beyond North Creek, in the county of Warren.

Counsel argue that the contract with the State was that plaintiff in error should avail itself of the grant and complete the road within ten years from the filing of its articles of association, or forfeit its existence and powers; that this was one of the conditions of the contract; that it was perfectly competent for the State to release the other party from the fulfilment of such condition without in any way withdrawing its own grant if it chose to do so; and that this was the sole effect of the application for and the obtaining of the certificate. In other words, that the Adirondack railway company was released from the obligation to extend its road, but retained the right to do so at any time within nine hundred and ninety years, and that although the company still possessed and operated the road so far as constructed, and had asked and received a dispensation from carrying its enterprise further except as it might choose during the passage of centuries, the State was bound by contract not to withdraw the bare right, notwithstanding the contract, according to its express terms, might be changed or abrogated.

Undoubtedly the power to amend or repeal cannot be availed of to take away property already acquired or to deprive a cor-

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poration of the fruits already reduced to possession of contracts lawfully made. But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope. *People v. Cook*, 148 U. S. 397; *Pearsall v. Great Northern Railway Co.*, 161 U. S. 646; *Bank of Commerce v. Tennessee*, 163 U. S. 416, 424.

But it is said that by the filing of the map across township fifteen and the service of its notices, the railroad company so far exerted its capacity to extend and construct as to secure rights in the strip of land which could not be taken at all, or if so, not without compensation.

The railroad law provided that companies formed under it before constructing any part of their road into or through any county named in their articles of association should make a map and profile of the route intended to be adopted, file the same in the office of the clerk of the county in which the road was to be made, and give written notices to all actual occupants of the route so designated, and that any party feeling aggrieved by the location might within fifteen days after receiving notice apply to a justice of the Supreme Court, by petition, who could affirm or alter the proposed route in such manner as might be consistent with the just rights of all parties and the public. The code of civil procedure provided for proceedings to be taken to acquire title to real property for a public use by condemnation.

In this case the railroad company filed its map on September 18 and served its notices September 23, 1897. The forest preserve board on August 6, 1897, had accepted an offer by the owners of lands, over which the route was projected, and conveyance thereof was about to be delivered, when on September 30, 1897, an injunction was granted at the suit of the railway company restraining the owners from conveying. The fifteen days for objections to the proposed route prescribed by the railroad law had not then expired. The State condemned October 7, and on the same day, but subsequently,

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the company commenced proceedings to condemn under the code.

The Court of Appeals held that assuming that the filing of the map created a lien, or something in the nature of a lien, as this was by statute and not by contract, it could be done away with by statute without liability to make compensation, unless some vested right had accrued under it.

The court further held that no lien nor any right in the nature of a lien could be created as against the State by the mere filing of a route map under the railroad law; that the filing established no right against the owners, because that would be in violation of the Constitution; and that it established none against the State because the power of the State was paramount. But the court was of opinion that, as against all other railroad companies, and as against all other creatures of the State empowered to use the right of eminent domain, "it gave the exclusive right to occupy the particular strip of land for railroad purposes until the legislature authorized it to be devoted to some other public use." And the court said: "The claim that a lien, good as against the creator of the corporation, was placed upon the land simply by the grant of a franchise to exist as a corporation in order to build a road, followed by the filing of a map of the proposed route and notice thereof to the occupants, but by nothing else, cannot be sustained. There is no property in a naked railroad route existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation."

In arriving at these conclusions the Court of Appeals was construing and applying the laws of the State of New York, and we perceive no adequate ground for declining to accept its views in accordance with the general rule on that subject. In any view, we think that the proceedings on the part of the State impaired the obligation of no contract between it and the railroad company.

Counsel concedes that the sovereign power of eminent domain is inherent in government as such, requiring no constitutional recognition and is as indestructible as the State itself;

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and "that all private property, tangible and intangible, is held subject to the exercise of the right by the sovereign power, even that which may already be devoted to a public use."

It is insisted, however, that the constitutional limitations on the exercise of the power, though conditions merely and not part of the power itself, require that the owner shall have an opportunity to contest the legality of the taking, and that ultimate payment of just compensation must be secured.

And the constitutionality of the act of 1897 is attacked as authorizing the deprivation of property without due process of law, and the taking thereof without provision for compensation.

The forest preserve was created by an act of May 15, 1885, and consisted of "all the lands now owned or which may hereafter be acquired by the State of New York within the counties of Essex, Warren, Hamilton and other counties."

Section eight read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." The forest commission was created by the act, and in 1890 was authorized to "purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park," and an appropriation was made for that purpose. By an act of May 20, 1892, the Adirondack park was established in the counties of Hamilton, Herkimer, St. Lawrence, Franklin, Essex and Warren, was made part of the forest preserve, and declared to be "forever reserved, maintained and cared for as ground open for the free use of all the people for their health or pleasure, and as forest lands necessary to the preservation of the head waters of the chief rivers of the State, and a future timber supply," and the forest commission was given power to contract for the purchase of land subject to restrictions therein mentioned. Laws on the subject of this park were passed in 1893, 1894 and 1895, and in the latter year a new state constitution came into effect, of which section seven of Article VII was as follows: "The lands of the State now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands.

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They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

Then came the act of 1897, creating the forest preserve board, which was empowered to acquire for the State by purchase or otherwise "such lands, structures or waters" within the limits of Adirondack park as might be deemed advisable for the interests of the State, and to enter thereon and take possession thereof.

By section four it was provided that when the board should have determined to appropriate certain lands, the state engineer should furnish it with an accurate description thereof certified by him to be correct; that a majority of the board should indorse on such description a certificate setting forth that the lands specified had been appropriated by the State for the purpose of making them a part of Adirondack park, which description and certificate should thereupon be filed in the office of the secretary of state; that the board should then serve on the owner of the property so appropriated a notice setting forth the fact of such filing, the date of filing and a general description thereof; and that "from the time of such service the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State."

Under the sixth section the owner, if unable to agree with the board on the value of the property appropriated or the amount of damages resulting from such appropriation, might within two years after the service upon him of the notice of appropriation, present to the Court of Claims a claim for the value of the land and for damages, and the Court of Claims shall have jurisdiction to hear and determine such claims and render judgment thereon, provision being made for the payment of such judgment.

By the nineteenth section it was provided that when a judgment for damages was rendered, "and it appears that there is

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any lien or incumbrance on the property so appropriated, the amount of such lien shall be stated in the judgment, and the comptroller may deposit the amount awarded to the claimant in any bank in which moneys belonging to the State may be deposited, to the account of such judgment to be paid and distributed to the persons entitled to the same as directed by the judgment."

The lands taken for the park were thereby dedicated to a public use regarded by the State as of such vital importance to the people that they were expressly put by the constitution beyond the reach of any other destination. The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government, and this must obviously be so where the State takes for its own purposes. The State possesses the power as a sovereign and as a sovereign exerts it. How can its citizens call on the courts to review the grounds on which the State has acted in the absence of legislation permitting that to be done?

It is true that the State may delegate the power, and where it has done so to a railroad corporation and by its exercise lands have been subjected to a public use, they cannot be applied to another public use without specific authority, expressed or imperatively implied, to that effect. But the sovereign power of the State cannot be alienated, and where exercised is exclusive.

In this case the use for the park was in itself inconsistent with the use for railroad purposes, and the legislation and the constitution alike forbade this company to acquire for its use any portion of that which the State had taken for its own exclusive and designated purposes.

Compensation must indeed be made, and inquiry as to its amount in some appropriate way, before some properly constituted tribunal, must be provided for, *Backus v. Union Depot Company*, 169 U. S. 557, and it is the rule in New York that where this is done, and a certain, definite and adequate source of payment is provided, compensation need not actually be made in advance of a taking by the State or one of its municipal

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subdivisions. *In the Matter of the Mayor, &c.*, 99 N. Y. 569; *Sweet v. Rechel*, 159 U. S. 380, 400.

This act fulfils these requirements in that the state treasury is the source of payment, and an appropriate mode is designated for the ascertainment of compensation as to owners and those holding liens and incumbrances. In providing for notice to owners only, the act seems to contemplate that it will appear in the progress of the proceedings to ascertain compensation whether there are outstanding claims, and that such claimants may thereupon come forward and be heard.

We need not discuss the sufficiency of the provision in this respect, since we agree with the Court of Appeals, as has already been indicated, that the railroad company occupies no position entitling it to raise the question. The steps it had taken had not culminated in the acquisition of any property or vested right; and no contract between it and the State was impaired, nor was due process of law denied to it within the meaning of the Constitution of the United States under the circumstances disclosed on this record.

Judgment affirmed.
